Office - Supreme Court, U.S.
FILED
NOV 22 1983
ALEXANDER L. STEVAS,
CLERK

83-850
No. -

# In the Supreme Court of the United States

OCTOBER TERM, 1983

---

UNITED STATES OF AMERICA, PETITIONER

*v.*

JAMES CONNORS KARO, ET AL.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

---

REX E. LEE
*Solicitor General*

STEPHEN S. TROTT
*Assistant Attorney General*

ANDREW L. FREY
*Deputy Solicitor General*

ELLIOTT SCHULDER
*Assistant to the Solicitor General*

VINCENT L. GAMBALE
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTIONS PRESENTED

1. Whether warrantless installation of a beeper inside a container of chemicals with the consent of the original owner violates the Fourth Amendment rights of a suspect in a drug manufacturing scheme to whom the container is subsequently transferred.

2. Whether the warrantless monitoring of signals from a beeper installed inside a container of chemicals that law enforcement authorities reasonably believe will be used to manufacture illegal drugs violates the Fourth Amendment when the monitoring occurs while the beeper is located within a home or other "private" area (such as a commercial storage locker).

## PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Richard Miles Horton, William Robertson Harley, Michael Gaylord Steele and Evan Roth are respondents in this Court. Gene R. Rhodes was a party to the proceedings below but is not a respondent herein.

TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Constitutional provision involved | 2 |
| Statement | 2 |
| Reasons for granting the petition | 9 |
| Conclusion | 17 |
| Appendix A | 1a |
| Appendix B | 16a |
| Appendix C | 23a |
| Appendix D | 24a |
| Appendix E | 25a |
| Appendix F | 26a |


TABLE OF AUTHORITIES

Cases:


*United States* v. *Abel*, 548 F.2d 591, cert. denied, 431 U.S. 956 ..... 11

*United States* v. *Bailey*, 628 F.2d 938 ..... 9, 11, 13, 17

*United States* v. *Bernard*, 625 F.2d 854 . 9, 10, 14

*United States* v. *Brock*, 667 F.2d 1311, cert. denied, No. 81-6922 (Mar. 7, 1983)..... 14

*United States* v. *Bruneau*, 594 F.2d 1190, cert. denied, 444 U.S. 847 ..... 10-11

*United States* v. *Cheshire*, 569 F.2d 887, cert. denied, 437 U.S. 907 ..... 11

*United States* v. *Curtis*, 562 F.2d 1153, cert denied, 439 U.S. 910 ..... 11

Cases:—Continued Page

*United States* v. *Devorce*, 526 F. Supp. 191, aff'd *sub nom. United States* v. *Lombardo*, 697 F.2d 299, cert. denied, No. 82-5259 (Mar. 7, 1983) ..... 11

*United States* v. *Dubrofsky*, 581 F.2d 208 ..... 14

*United States* v. *Hufford*, 539 F.2d 32, cert. denied, 429 U.S. 1002 ..... 11

*United States* v. *Knotts*, 662 F.2d 515, rev'd, No. 81-1802 (Mar. 2, 1983) ..... 11

*United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983) ..... 3, 8, 9, 10, 12, 14, 15

*United States* v. *Lewis*, 621 F.2d 1382, cert. denied, 450 U.S. 935 ..... 10

*United States* v. *Martinez-Fuerte*, 428 U.S. 543 15

*United States* v. *Mendenhall*, 446 U.S. 544 .... 15

*United States* v. *Miroyan*, 577 F.2d 489, cert. denied, 439 U.S. 896 ..... 11

*United States* v. *Moore*, 562 F.2d 106, cert. denied, 435 U.S. 926 ..... 9, 13

*United States* v. *Place*, No. 81-1617 (June 20, 1983) ..... 16

Constitution and statutes:

U.S. Const. Amend. IV ..... 2, 7, 8, 9, 10, 12, 13, 14, 15

18 U.S.C. 2518(8)(d) ..... 4

21 U.S.C. 841(a)(1) ..... 2

21 U.S.C. 846 ..... 2

# In the Supreme Court of the United States

OCTOBER TERM, 1983

No.

UNITED STATES OF AMERICA, PETITIONER

*v.*

JAMES CONNORS KARO, ET AL.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App. *infra*, 1a-15a) is reported at 710 F.2d 1433. The opinion of the district court (App. *infra*, 16a-22a) is not reported.

### JURISDICTION

The judgment of the court of appeals (App. *infra*, 23a) was entered on June 20, 1983. A petition for rehearing was denied on August 26, 1983 (App. *infra*, 24a). On October 17, 1983, Justice White extended the time within which to file a petition for a writ of certiorari to and including November 24, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT

In an indictment filed in the United States District Court for the District of New Mexico, respondents and co-defendant Gene R. Rhodes were charged with conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. Respondents Horton, Harley, Steele and Roth were also charged with possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). In addition, the indictment charged respondent Karo with possession of cocaine with intent to distribute it and distribution of cocaine, both in violation of 21 U.S.C. 841(a)(1).

1. Prior to trial, respondents filed a joint motion to suppress evidence seized in a warrant-authorized search of a house in Taos, New Mexico. Respondents contended that the search warrant for the Taos residence was invalid because it was based on information derived from allegedly unlawful beeper surveillance.

The evidence at the suppression hearing showed that on March 3, 1980, in Albuquerque, New Mexico, Drug Enforcement Administration (DEA) agents conducted a judicially authorized search of a storage locker rented by Richard Logan and discovered laboratory equipment, glassware and chemicals used to manufacture amphetamines. Some of the boxes containing laboratory equipment and chemicals bore shipping labels addressed to Carl Muehlenweg of Graphic Photo Design

in Albuquerque. H. Tr. 46-47, 167-169, 307. Approximately six weeks later, DEA agents executed search warrants at Graphic Photo Design, which turned out to be Muehlenweg's residence, and at T & M Research, where Muehlenweg worked. At those locations, the agents discovered invoices and statements reflecting that Muehlenweg had ordered and obtained laboratory glassware and chemicals that had been found in Logan's locker. H. Tr. 47-48, 165, 177.

Shortly thereafter, Muehlenweg acknowledged to the DEA that Logan had ordered chemicals and laboratory glassware through him, and he agreed to become a DEA informant (H. Tr. 42-43, 126, 167-168, 308-309).[1] Muehlenweg also apprised the agents that he had previously ordered ether for respondents Karo, Horton, and Harley for their use in the production of cocaine. In late August 1980, Muehlenweg told DEA Agent Richard Rottinger that he had ordered a 50-gallon shipment of ether for Karo, Horton, and Harley, which they planned to use to extract cocaine from clothing that had been imported into the United States. H. Tr. 124-130, 178, 191, 196, 257-258. Agent Rottinger confirmed that Muehlenweg had ordered and paid for ten five-gallon cans of ether from BWR Scientific, Inc., for delivery in September 1980 (H. Tr. 48-50, 143-146).

Prior to the arrival of that shipment, the government obtained a court order authorizing the installation and monitoring of a beeper[2] in one of the cans of

---

[1] A few weeks later, after being tipped off by Muehlenweg, agents observed Logan pick up chemicals and equipment from Muehlenweg, but Logan shot and killed himself when the agents moved in to arrest him (H. Tr. 91, 125-126, 169, 309-310).

[2] "A beeper is a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver." *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983), slip op. 1.

ether that had been ordered by Muehlenweg.[3] With Muehlenweg's permission, the DEA picked up the shipment from the common carrier, substituted a can containing a beeper for one of the cans in the shipment, repainted the cans so that they would all look alike, and then delivered them to Muehlenweg's residence. H. Tr. 48-54. On September 20, 1980, agents observed resondent Karo pick up the ether from Muehlenweg's house and, using visual and beeper surveillance, followed Karo as he transported the ether to his residence in Muehlenweg's automobile. Still under surveillance, Karo then returned the automobile to Muehlenweg's residence. App. *infra*, 4a; H. Tr. 58-59, 181-182, 275.

By monitoring the beeper later that day, the agents ascertained that the ether had been transferred to respondent Horton's house. The ether's presence at that location was confirmed by a DEA agent who walked along the sidewalk and smelled the odor of ether

---

[3] The affidavit in support of the application for the beeper authorization order falsely indicated that Muehlenweg was a target of the DEA investigation relating to the ether shipment, and did not state that he was cooperating with the DEA as a confidential informant. According to the testimony of the prosecutor involved, the affidavit was drafted in that manner in order to preserve Muehlenweg's usefulness as a confidential informant and to protect his safety in the event the targets of the investigation obtained copies of the warrant applications. H. Tr. 232-236, 254. The prosecutor was concerned that the targets might ultimately obtain the applications if the district court adopted target notification procedures analogous to those contained in the federal wiretap statute, 18 U.S.C. 2518(8)(d) (H. Tr. 237-238). The prosecutor and Agent Rottinger testified, however, that at the time the application was made, the prosecutor orally advised the issuing judge that Muehlenweg was actually cooperating in the investigation, and that he explained to the judge that that information had been omitted from the warrant application to preserve Muehlenweg's confidential informant status (H. Tr. 208-209, 237, 246).

emanating from Horton's residence. App. *infra*, 4a-5a; H. Tr. 59-60, 182-183. Subsequent monitoring of the beeper two days later, on September 22, 1980, revealed that the ether had been moved to the home of Horton's father. The following day, the agents traced the ether by means of the beeper to a commercial self-storage facility in Albuquerque. The beeper did not enable the agents to identify the particular locker that contained the chemical; however, the agents detected the odor of ether emanating from locker 143 and ascertained that respondents Horton and Harley had rented that locker. On October 8, 1980, the agents obtained an order authorizing installation of an entry tone alarm in that locker. During installation of the alarm on the following day, the agents saw the cans of ether inside the locker. The alarm malfunctioned, however, and the agents did not learn that the ether had been removed by respondent Horton until October 16, 1980, when they were so notified by the manager of the storage facility. App. *infra*, 5a; H. Tr. 60-61, 62-73, 182-184, 216-217.

Three days later, on October 19, the agents picked up the beeper signal at another self-storage facility in Albuquerque. With the permission of the storage facility's manager, the agents installed a closed circuit video camera that was focused on the door of locker 15, which had been rented under an alias by respondents Horton and Harley. On December 31, 1980, agents monitoring the camera observed respondents Horton and Harley enter the locker, and on February 6, 1981, they observed co-defendant Rhodes and an unidentified woman remove the cans of ether and load them into Horton's pickup truck. By means of both visual and beeper surveillance, agents followed the truck to Rhodes' residence, where it was parked in the driveway. App. *infra*, 5a-6a; H. Tr. 82-85, 97-103, 155.

Later that day, DEA agents followed the truck containing the ether to a residence in Taos, New Mexico rented by respondents Horton, Harley, and Steele. During their surveillance of the Taos residence, the agents monitored the beeper to determine its continued presence at the house. App. *infra*, 6a; H. Tr. 100-103, 111-112, 120, 135-138, 156-158. Relying on information obtained in the course of their investigation, including information derived through the use of the beeper regarding the various locations to which the ether had been transported, the agents secured a search warrant for the Taos residence. On February 10, 1981, the warrant was executed, cocaine and laboratory equipment were seized, and respondents Horton, Harley, Steele and Roth were arrested. App. *infra*, 6a.

2. The district court granted respondents' motion to suppress the evidence seized at the Taos residence (App. *infra*, 25a). The court concluded that the order authorizing the installation of the beeper was invalid because the government had made deliberate misrepresentations in the warrant application, and that the evidence in question was the fruit of the improperly authorized beeper surveillance (Tr. 331-334). Thereafter, the district court denied the government's motion to reconsider its suppression ruling, rejecting the argument that the installation and monitoring of the beeper did not require a warrant (App. *infra*, 16a-22a, 26a).

3. On appeal, the government did not challenge the district court's finding that the order authorizing the beeper was invalid (App. *infra*, 3a).[4] Rather, the gov-

---

[4] Because the inaccuracies in the written warrant application were not designed to mislead the magistrate, the true facts were revealed to the magistrate prior to issuance of the beeper warrant, and the variation between the written statement and the oral disclosure could not have affected the finding of probable cause, we believe the district court erred in invalidating the

ernment contended that the Fourth Amendment does not require a warrant for the installation and monitoring of a beeper, that the defendants lacked "standing" to contest the use of the beeper, and that the evidence seized pursuant to the search warrant for the Taos residence was not the fruit of the beeper surveillance.

The court of appeals affirmed the suppression order except as to co-defendant Rhodes (App. *infra*, 1a-15a).[5] At the outset, the court rejected the argument that the defendants could not have had any legitimate expectations of privacy in the can of ether because the ether was intended for use in the manufacture of contraband (*id.* at 3a-4a). The court then concluded (*id.* at 6a-9a) that Karo's Fourth Amendment rights were violated at the time he picked up the can of ether from Muehlenweg because the installation of the beeper in the can had not been authorized by a valid warrant. In so concluding, the court expressly refused to follow the holdings of other courts that have ruled that no warrant is required to install a beeper in a container with the consent of the owner (*id.* at 6a-7a). The court explained (*id.* at 7a-9a) (footnotes and citation omitted):

> Although the physical installation of the beeper in the can takes place before the new owner picks it up, we believe an intrusion occurs at the time the item comes into his possession. All individuals have a legitimate expectation of privacy that objects coming into their rightful ownership do not have electronic devices attached to them, devices that

---

beeper warrant. That issue, not having been preserved on appeal, is not presented here.

[5] The court held that Rhodes, who transported the ether from Albuquerque to Taos, failed to establish that his legitimate expectations of privacy had been violated by the beeper surveillance or the search of the Taos residence. App. *infra*, 14a-15a.

> would give law enforcement agents the opportunity to monitor the location of the objects at all times and in every place that the objects are taken, including inside private residences and other areas where the right to be free from warrantless government intrusion is unquestioned. * * * The installation of a beeper on an item of personal property gives the government the capability of tracing every movement of the object on which the beeper is placed. * * * We believe that individuals have a reasonable and legitimate expectation that the government will not engage in such activity without the protections afforded by resort to the judicial process. * * * Thus, regardless of the consent obtained when the beeper is physically installed, an infringement of the new owner's Fourth Amendment rights begins at the time the object comes into his control. The consent of the owner to have a beeper installed cannot suffice to continue the installation once the item belongs to someone else any more than the consent of a previous owner of a suitcase could suffice to permit the police to periodically open and search the suitcase after it comes under the ownership of another.

The court also held that the monitoring of the beeper without a valid warrant violated the Fourth Amendment (App. *infra*, 9a-11a). It sought to distinguish this Court's decision in *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983), on the following grounds: that here the beeper was monitored while the can was inside private premises and storage lockers, whereas in *Knotts* the beeper was never monitored inside a residence; that, unlike in *Knotts*, the monitoring here gave the agents information they could not have discovered even by constant visual surveillance; that the surveillance in *Knotts* lasted only a short time, whereas here it covered a five-month period; and that here, unlike in *Knotts*, the officers lost track of the can

for substantial periods of time and much of the tracing of the ether to new locations was possible only by use of the beeper. App. *infra*, 9a-10a. Relying on *United States* v. *Moore*, 562 F.2d 106, 113 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978), and *United States* v. *Bailey*, 628 F.2d 938, 940 (6th Cir. 1980), while expressly rejecting the contrary ruling in *United States* v. *Bernard*, 625 F.2d 854, 861 (9th Cir. 1980), the court concluded (App. *infra*, 10a) that "the warrantless use of a beeper to monitor the location of noncontraband withdrawn from public view inside private residences or similarly protected places is an unconstitutional search or seizure."[6]

## REASONS FOR GRANTING THE PETITION

Last Term, in *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983), this Court held that the use of a beeper by law enforcement officers to trace a can of chemicals

---

[6] Rejecting the argument that the evidence seized pursuant to the search warrant for the Taos residence was not the fruit of any illegal beeper surveillance, the court of appeals found a direct link between the beeper monitoring and the information that the ether was at the Taos residence (App. *infra*, 11a-12a). The court noted (*id.* at 14a n.6) that, even though there were breaks in the monitoring between the initial delivery of the ether to Karo and the tracking of the ether to Taos, there was no break between the monitoring of the beeper while it was in the second storage locker and its transfer to the Taos residence.

In addition, the court rejected the argument that respondent Roth (who was a visitor at the Taos residence and had stayed there for several days prior to the search) and Karo (who had no connection with that residence, but whose rights allegedly were infringed by the installation of the beeper) lacked "standing" to seek suppression of the evidence (App. *infra*, 13a-14a).

We do not here raise the fruits and "standing" issues, except insofar as a favorable resolution of the first question presented would establish that there was no violation of respondent Karo's Fourth Amendment rights.

from its place of purchase to the defendant's residence did not violate the defendant's legitimate expectations of privacy and thus did not constitute a "search" or "seizure" within the meaning of the Fourth Amendment. This case presents two important and recurring Fourth Amendment questions relating to beeper surveillance that the Court did not specifically resolve in *Knotts*. The first question is whether, as the court of appeals held, the mere installation of a beeper in a container with the consent of the original owner amounts to a search or seizure that, unless authorized by a valid warrant, infringes the new owner's Fourth Amendment rights at the time the container comes into his possession. The second question is whether the warrantless monitoring of a beeper's signals violates the Fourth Amendment whenever, at the time of monitoring, the container in which the beeper has been installed is situated inside a home or other "private" area. The holdings of the court of appeals on both of these questions are in direct conflict with the decisions of other courts of appeals. Accordingly, review by this Court is warranted to resolve the conflicts on these important questions of Fourth Amendment law.

1. Cases involving the permissibility of beeper use ordinarily raise two distinct issues, one relating to the installation of the beeper in a package or conveyance, the other relating to the monitoring of signals transmitted by the beeper. Although the Court in *Knotts* recognized this distinction, it did not pass on the installation issue because Knotts did not challenge the warrantless installation of the beeper in his case. The Court noted, however, that several courts of appeals have approved warrantless installations. *Knotts*, slip op. 3 n.*, citing *United States* v. *Bernard*, 625 F.2d 854, 860 (9th Cir. 1980); *United States* v. *Lewis*, 621 F.2d 1382, 1388 (5th Cir. 1980), cert. denied, 450 U.S. 935 (1981); *United States* v. *Bruneau*, 594 F.2d 1190, 1194 (8th

Cir.), cert. denied, 444 U.S. 847 (1979); *United States* v. *Miroyan*, 577 F.2d 489, 493 (9th Cir.), cert. denied, 439 U.S. 896 (1978); *United States* v. *Cheshire*, 569 F.2d 887, 889 (5th Cir.), cert. denied, 437 U.S. 907 (1978); *United States* v. *Curtis*, 562 F.2d 1153, 1156 (9th Cir. 1977), cert. denied, 439 U.S. 910 (1978); *United States* v. *Abel*, 548 F.2d 591, 592 (5th Cir.), cert. denied, 431 U.S. 956 (1977); *United States* v. *Hufford*, 539 F.2d 32, 34 (9th Cir.), cert. denied, 429 U.S. 1002 (1976). See also *United States* v. *Knotts*, 662 F.2d 515, 517 n.2 (8th Cir. 1981), rev'd on other grounds, No. 81-1802 (Mar. 2, 1983); *United States* v. *Bailey*, 628 F.2d 938, 943 (6th Cir. 1980); *United States* v. *Devorce*, 526 F. Supp. 191, 199-200 (D. Conn. 1981), aff'd *sub nom. United States* v. *Lombardo*, 697 F.2d 299 (2d Cir. 1982) (table), cert. denied, No. 82-5459 (Mar. 7, 1983). Indeed, in this case, the court of appeals expressly acknowledged (App. *infra*, 6a-7a) that other courts have upheld the warrantless installation of a beeper inside a container with the consent of the original owner. This clear conflict requires resolution by this Court.

We believe the holding of the court of appeals is plainly incorrect. As is evident from its own analysis of the installation issue (App. *infra*, 7a-9a), the intrusion, if any, into legitimate expectations of privacy occasioned by beeper surveillance occurs when a beeper is *monitored* to ascertain the location of the container in which it has been installed. No search or seizure of any sort occurs when the beeper is placed inside the container with the consent of the original owner or when the container is transferred to the suspect purchaser. Unless the beeper is activated and its signals monitored, the beeper tells nothing about the whereabouts of the container. Thus, the court's analogy to a previous owner of a suitcase consenting to subsequent searches of the suitcase (*id.* at 8a-9a) is totally inapposite. Al-

though the owner of a container generally has a legitimate expectation of privacy in the contents of the container, a beeper does not disclose the container's contents, which are already known to the agents when they install the beeper with the original owner's consent. Instead, the beeper discloses only the present location of the container. As the Court held in *Knotts*, however, there is no legitimate expectation of privacy with respect to this information, at least where the container's location could have been ascertained by visual surveillance of the suspect's vehicle while it travelled over public roads.

Here, respondent Karo certainly had no greater privacy interest in the location of the container than did the defendant in *Knotts*. There, the beeper was used to ascertain the arrival of a can of chemicals on the defendant's premises. Because this same information could have been obtained through constant visual surveillance, the Court concluded that the use of the beeper did not implicate Fourth Amendment concerns. In this case, insofar as respondent Karo is concerned, the beeper revealed only that Karo transported the container of ether in Muehlenweg's automobile from Muehlenweg's residence to his own home. As was the case in *Knotts*, this same information could have been obtained by direct visual surveillance. Moreover, as the court of appeals conceded (App. *infra*, 13a), Karo could not establish a legitimate expectation of privacy in the locations at which the beeper was monitored after it left his house, including the Taos residence where the warrant-authorized search uncovered an illicit drug manufacturing laboratory. The court nevertheless concluded that Karo could move to suppress the evidence seized from that residence by virtue of his challenge to the installation of the beeper (*id.* at 14a; see also *id.* at 6a n.1). Under the ruling below, therefore, even where a defendant's legitimate expectations of privacy are not infringed by beeper monitoring, the defendant may still

object to the use of the beeper by challenging its installation. The effect of the court of appeals' decision is to limit *Knotts* to cases in which the defendant's lawyer fails to object to insertion of the beeper.

2. The court of appeals' ruling on the monitoring issue also warrants review. To begin with, the question whether the Fourth Amendment is violated by the warrantless monitoring of a beeper while it is located inside private premises is one on which the courts of appeals are sharply divided. The holding of the court of appeals that a warrant is required in these circumstances is in accord with the decisions of the First and Sixth Circuits, but conflicts with decisions of the Ninth Circuit.

In *United States* v. *Moore*, 562 F.2d 106 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978), the court acknowledged that "the limited data transmitted by a beeper [is] far less revealing than the conversation recorded in *Katz*" and "the level of intrusion * * * less severe." 562 F.2d at 113. The court nevertheless concluded that when the defendants took inside their house a box of chemicals which, unbeknownst to them, contained a beeper, "they had every right to expect that their activities inside the house which they sought to preserve as private would be free from warrantless intrusion by the Government." *Ibid.*

Relying on *Moore*, the Sixth Circuit, in *United States* v. *Bailey*, 628 F.2d 938, 944 (1980), concluded that "[b]eeper surveillance of non-contraband personal property in private areas trenches upon legitimate expectations of privacy and constitutes a search or seizure within the meaning of the fourth amendment." Although the agents in *Bailey* had obtained a warrant authorizing the use of the beeper, the court held that the warrant was invalid because it contained no provision limiting the duration of the surveillance. *Id.* at 945-946. Accordingly, it suppressed evidence obtained as a result of the beeper surveillance.

The Ninth Circuit, on the other hand, has consistently held that the Fourth Amendment permits the warrantless monitoring of a beeper attached to a container that has been taken inside private premises. See *United States* v. *Brock*, 667 F.2d 1311, 1318-1322 (1982), cert. denied, No. 81-6922 (Mar. 7, 1983); *United States* v. *Bernard*, 625 F.2d 854, 860-861 (1980); *United States* v. *Dubrofsky*, 581 F.2d 208, 211 (1978). In *Dubrofsky*, for example, the court upheld the warrantless monitoring of a beeper transmitting from inside a package after it had been taken into a residence, reasoning that a device that continually broadcasts "here I am" constitutes only a "slight" intrusion and "is not an impermissible search." 581 F.2d at 211. The court explained (*ibid.*) (footnote omitted):

> Transmitting the package's location is merely an aid to what can be accomplished by visual surveillance. Permissible techniques of surveillance include more than the five senses of officers and their unaided physical abilities. Binoculars, dogs that track and sniff out contraband, searchlights, fluorescent powders, automobiles and airplanes, burglar alarms, radar devices, and bait money contribute to surveillance without violation of the Fourth Amendment in the usual case. On the other hand, wiretaps, breaking and entering, and many other searches and seizures fall on the other side of the line. The issue before us is whether the mere presence of the beeper, it having been attached without violating the Fourth Amendment, sufficiently resembles a wiretap to require the "antecedent justification" that a warrant would provide. We hold that it does not.

Moreover, although the instant case may be factually distinguishable from *Knotts*, the decision below seems to us inconsistent with the principle underlying *Knotts*. Under the teaching of *Knotts*, the use of a beeper to monitor the movement of a container from one location

to another does not disclose information as to which there is a legitimate expectation of privacy, even though each location may itself be private premises, because the actual movement—which is all that the beeper reveals—takes place over public roads. Similarly, the information revealed by the beeper—that it has arrived at a particular location—is the same regardless whether it is broadcasting its signals from a position inside the premises (as here) or outside the premises (as in *Knotts*). The beeper tells nothing about the interior of the premises into which it has been taken other than the fact that it is there. Because, under *Knotts*, respondents had no legitimate privacy expectations with respect to the arrival of the container at any particular locations, it is immaterial that the beeper was actually situated inside private residences or storage lockers at the time its signals were monitored.

Even if the monitoring of a beeper in circumstances such as those present here may be deemed a search or seizure within the contemplation of the Fourth Amendment, the court of appeals erred in imposing a warrant requirement.[7] In determining the reasonableness of law enforcement actions in particular contexts, "the Court has weighed the public interest against the Fourth Amendment interest of the individual." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 555 (1976). There can be little doubt that the governmental interest served by the beeper surveillance in this case was substantial, if not compelling. See *United States* v. *Mendenhall*, 446 U.S. 544, 561-562 (1980) (Powell, J., concurring). As this case illustrates, a beeper is an extremely useful investigative tool in uncovering illegal drug manufacturing operations. By the same token, a beeper is capable of conveying only strictly limited in-

[7] We have set forth these arguments at length in our brief in *Knotts*, copies which we are sending to counsel for respondents.

formation and poses little threat of revealing to government agents any lawful private activity. See *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 10-11. Because the substantial societal concern with drug enforcement outweighs the limited intrusion, if any, on privacy interests resulting from beeper surveillance, use of a beeper to locate a source of illegal drugs is fully justified on the basis of reasonable suspicion that criminal activity is afoot.

If reasonable suspicion is sufficient to justify use of a beeper, it follows that a warrant (which may only be issued on probable cause) is not required under the Fourth Amendment. But even if probable cause is required (and probable cause was clearly present here), the monitoring of a beeper should not require a warrant.

We note that, as a practical matter, by imposing a warrant requirement whenever a beeper is taken into a private area, the court of appeals has made it necessary for agents to obtain a warrant in every investigation in which a beeper is used, since they will not know in advance whether the beeper will be inside a private area at the time its signals are monitored. But requiring a warrant simply because a beeper may be monitored while it is inside a private area ignores the lack of substantial privacy concerns implicated by beeper surveillance. The marginal benefits of antecedent judicial control of the limited intrusions affected by beepers are outweighed by the significant costs that would be entailed by a warrant requirement.[8] In short, the decision

[8] Certain technical requirements associated with warrants are difficult, if not impossible, to satisfy in connection with the use of beepers. For instance, the violation of privacy that is supposed to exist in this case is the "search" of the private premises in which the beeper-laden container is located, yet it is plainly impossible to specify in the warrant application the place to be searched (that is precisely what the beeper monitoring it-

below needlessly hampers the ability of law enforcement authorities to employ an extremely effective device in uncovering illegal drug operations.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
*Solicitor General*

STEPHEN S. TROTT
*Assistant Attorney General*

ANDREW L. FREY
*Deputy Solicitor General*

ELLIOTT SCHULDER
*Assistant to the Solicitor General*

VINCENT L. GAMBALE
*Attorney*

NOVEMBER 1983

---

self discloses). Additionally, because long delays between the procurement of the chemicals and the illicit manufacturing operation are common modus operandi of offenders like respondents, beeper warrants are not amenable to temporal limitation like other warrants. But see *United States* v. *Bailey*, 628 F.2d at 945-946.

APPENDIX A

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

*v.*

JAMES CONNORS KARO, RICHARD MILES HORTON, WILLIAM ROBERTSON HARLEY, MICHAEL GAYLORD STEELE, EVAN ROTH, GENE R. RHODES, DEFENDANTS-APPELLEES.

Nos. 81-1899, 81-1902 to 81-1906.

United States Court of Appeals,
Tenth Circuit.

June 20, 1983.

Before MCWILLIAMS, LOGAN and SEYMOUR, Circuit Judges.

LOGAN, Circuit Judge.

This appeal arises from an action in which defendants James Karo, Richard Horton, William Harley, Michael Steele, Evan Roth, and Gene Rhodes were charged with conspiracy to possess cocaine with intent to distribute it, a violation of 21 U.S.C. § 846, and all defendants except Rhodes were charged with possession of cocaine with intent to distribute it, in violation of 21 U.S.C. § 841(a)(1). The defendants filed a joint motion to suppress evidence against them, claiming that the evidence was obtained in violation of their Fourth Amendment rights. The government had obtained an order authorizing the installation of an electronic tracking beacon (beeper) in a can of ether ordered by Karo, Horton, and Harley through a government informant. Government agents had installed the beeper and tracked the ether over a period of five months, dur-

ing which the can had come to rest in four homes and two rented storage lockers. Using the information obtained from beeper and other surveillance, government agents obtained a search warrant for the last residence to which the ether was taken, where they seized substantial incriminating evidence. The district court held that the order authorizing the installation of the beeper was invalid because the government made deliberate misrepresentations in the affidavits seeking the order. The court suppressed all the evidence obtained from the search of the residence as fruit of illegal monitoring.

The issues on appeal are (1) whether the government's appeal was timely filed; (2) whether the government was required to obtain a search warrant to install the beeper and use it to monitor movements of the can of ether; (3) if the warrantless use of the beeper was illegal, whether the evidence seized under the search warrant for the residence must be suppressed; and (4) whether the district court erred in suppressing the evidence as to all defendants.

I

The government must file its notice of appeal within thirty days after entry of the judgment or order from which it appeals. "A judgment order is entered within the meaning of this subdivision when it is entered in the criminal docket." Fed.R.App.P. 4(b). A motion to reconsider extends the time for filing a notice of appeal only if the motion is filed within the thirty days allowed for filing a notice of appeal. The notice of appeal must then be filed within thirty days after the denial of the motion to reconsider. *United States v. Martinez*, 681 F.2d 1248, 1253 (10th Cir. 1982).

In the instant case the judge stated in open court on May 12, 1981 that the motion to suppress would be granted. A notation of the ruling was made on the docket that day. The judge followed with a written order suppressing the evidence; the written order was dated

and noted on the docket on May 22, 1981. The government's motion for reconsideration was timely if measured from May 22, but was not timely if measured from May 12. The time allowed for appeal begins to run "'[w]hen the trial judge acts in a manner which clearly indicates his intention that the act shall be the final one in [the] case, and a notation of the act has been entered on the docket.' " *United States v. Martinez*, 681 F.2d at 1252 (quoting *Rubin v. United States*, 488 F.2d 87, 88 (5th Cir. 1973)). We believe that the May 22 entry rather than the May 12 entry controls because when the judge made his oral declaration he stated that a written order would be entered. *See United States v. Santia-Manriquez*, 609 F.2d 1162 (5th Cir. 1980); *United States v. Samango*, 607 F.2d 877,880 (9th Cir.1979); *United States v. St. Laurent*, 521 F.2d 506, 411 (1st Cir.1975), *cert. denied*, 423 U.S. 1049, 96 S.Ct. 775, 46 L.Ed.2d 637 (1976); *see also Carnes v. United States*, 279 F.2d 378 (10th Cir. 1960). Therefore, the government's motion to reconsider and subsequent notice of appeal were timely.

II

The government does not appeal the district court's finding that the order authorizing the beeper was invalid; therefore, the activity in this case must be treated as warrantless installation and monitoring. The government argues that no warrant was needed. Two claims are advanced by the government to support this argument: that the defendants had no expectation of privacy in the can of ether to which the beeper was affixed because the ether was contraband, and that any intrusion from the installation or monitoring of the beeper was too minimal to implicate the warrant requirement.

Ether is not a controlled substance, but the government argues that because the ether was to be used to produce cocaine it can be considered contraband. While courts generally recognize that a person does not have

a reasonable expectation of privacy in or right to possess contraband, *see, e.g., United States v. Washington*, 586 F.2d 1147, 1154 (7th Cir. 1978); *United States v. Pringle*, 576 F.2d 1114, 1119 (5th Cir. 1978); *United States v. Emery*, 541 F.2d 887, 889 (1st Cir. 1976), they have been unwilling to extend this rule to objects that are rightfully possessed but are suspected of use in criminal activity, *see, e.g., United States v. Knotts*, 662 F.2d 515, 517 (8th Cir. 1981), *rev'd on other grounds*, ___ U.S. ___, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983); *United States v. Bailey*, 628 F.2d 938, 944 (6th Cir. 1980); *United States v. Moore*, 562 F.2d 106, 111 (1st Cir.1977), *cert. denied*, 435 U.S. 926, 98 S.Ct. 1493, 55 L.Ed.2d 521 (1978). We agree that the suspicion that noncontraband material might be used in criminal activity does not turn it into contraband. Therefore, the defendants had a legitimate expectation of privacy in the can of ether.

The government's claims that the installation and monitoring of the beeper were not unlawful searches or seizures are much more difficult issues. Three of the defendants—Karo, Horton, and Harley—ordered ten five-gallon cans of ether from a government information, Carl Muehlenweg. Muehlenweg alerted Drug Enforcement Administration agents about the shipment and told the agents that the ether would be used in the production of cocaine. With Muehlenweg's consent government agents substituted their own can with a beeper installed in it for one of the cans in the shipment. The can containing the beeper was delivered to Muehlenweg's residence in Albuquerque, New Mexico. On September 20, 1980 Karo picked up the ether from Muehlenweg's residence. Using both visual and beeper surveillance, DEA agents traced the ether to Karo's home. An agent subsequently monitored the beeper to verify that the ether was still in Karo's residence. Later that same day the ether was transferred to Horton's

home in the same city. No agent saw the transfer; the new location was ascertained by use of a direction finder, which picked up the beeper signal. A DEA agent also walked the public sidewalk near Horton's residence and smelled the odor of ether in the immediate vicinity of the house.

Two days later, monitoring revealed that the ether was no longer at Horton's house. DEA agents had not observed any movement. They used the direction finder to locate the ether can in a third location, the home of Horton's father. The following day, the beeper was no longer transmitting from Horton's father's home. By using the direction finder, the agents were able to trace the can to a commercial self-storage facility in Albuquerque. When they could not trace the can to a particular locker, they obtained a subpoena and determined that Horton and Harley shared the rental expenses on locker 143. The agents verified that locker 143 contained the ether by walking to the front of that locker and sniffing the odor emanating from the cans. On October 8, 1980, DEA agents obtained an order authorizing installation of an entry tone alarm into the door jamb of locker 143. While opening the door of that locker to install the alarm they observed the cans containing the ether. Thereafter the agents apparently relied upon the entry tone alarm, which malfunctioned. They did not learn of the removal of the contents of the locker until October 16, when the manager of the storage facility informed them that the cans had been removed.

Using their direction finder, the agents picked up the beeper signal three days later at another self-storage facility in Albuquerque. Through discussions with the facility manager, the can of ether was traced to locker 15, which had been rented by Horton and Harley using an alias. The agents obtained an order permitting the installation of an entry tone alarm for this locker, but

instead, with the permission of the manager, installed in a separate locker a closed circuit video camera focused on the door of locker 15. This camera was monitored by DEA agents, who observed Horton and Harley visiting the locker. During this time the order authorizing the beeper lapsed and was extended by court order a few days later. Finally, on February 6, 1981, DEA agents observed by means of the video camera that the ether cans were being removed from the locker by Rhodes. Using both visual and beeper surveillance, the agents followed the ether to Rhodes' residence. The record indicates that the ether remained in a truck parked in the driveway of Rhodes' residence. That same day agents followed the truck to a residence in Taos, New Mexico rented by Steele, Horton, and Harley. The beeper was used to monitor the can of ether while it was inside the Taos residence. Three days later, the government obtained a search warrant for the residence, which was executed the following day. Horton, Harley, Steele, and Roth were arrested at the residence, and cocaine and laboratory equipment were seized in the search.

We first address the question whether the warrantless installation of a beeper in the can of ether designated to go to Karo was constitutionally permissible.[1] The government argues that because its informant, Muehlenweg, consented to placing the ether in the can containing the beeper, no warrant was required. This argument, which some courts have adopted, *see, e.g., United States v. Knotts*, 662 F.2d 515, 517 n. 2

---

[1] In *United States v. Knotts*, ___ U.S. ___, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), the Court did not consider the validity of the warrantless installation because it was not challenged in that case. *Id.* at ___ n. *, 103 S.Ct. at 1082 n. *. Here Karo's right to object to the admission of the evidence seized from the Taos house depends upon the validity of the installation, which he did challenge.

(8th Cir. 1981), *rev'd on other grounds*, ___ U.S. ___, 103 S.Ct 1081, 75 L.Ed.2d 55 (1983); *United States v. Bailey*, 628 F.2d 938, 943 (6th Cir. 1980), rests on the assumption that what happens to an object before it comes into the ownership of the defendant cannot be complained of by the defendant. Before Karo took control of the ether, the can with the beeper was the property of the DEA and the ether was the property of Muehlenweg. At that time, the DEA and Muehlenweg presumably could do with the can and ether whatever they liked without violating Karo's rights. But we do not think that the analysis should end at this rudimentary level. Although the physical installation of the beeper in the can takes place before the new owner picks it up, we believe an intrusion occurs at the time the item comes into his possession. All individuals have a legitimate expectation of privacy that objects coming into their rightful ownership do not have electronic devices attached to them, devices that would give law enforcement agents the opportunity to monitor the location of the objects at all times and in every place that the objects are taken, including inside private residences and other areas where the right to be free from warrantless governmental intrusion is unquestioned. In *United States v. Lewis*, 621 F.2d 1382, 1388 (5th Cir. 1980), the court noted that "[t]here arguably is a right to enjoy the use of goods without the possibility of uninvited monitoring that [even] an unactivated beeper would create." The installation of a beeper on an item of personal property gives the government the capability of tracing every movement of the object on which the beeper is placed. Since items of personal property seldom travel on their own accord, the installation also allows the tracing of movements of the person or persons possessing that object, regardless of the relationship of that person to the information sought by the government. We believe that individuals have a reasonable

and legitimate expectation that the government will not engage in such activity without the protections afforded by resort to the judicial process. *See Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967).[2] Thus, regardless of the consent obtained when the beeper is physically installed, an infringement of the new owner's Fourth Amendment rights begins at the time the object comes into his control.[3] The consent of one owner to have a beeper installed cannot suffice to continue the installation once the item belongs to someone else any more than the consent of a previous owner of a suitcase could suffice

---

[2] In *United States v. Shovea*, 580 F.2d 1382, 1387-88 (10th Cir.), *cert. denied*, 439 U.S. 986, 99 S.Ct. 581, 58 L.Ed.2d 659 (1978) *and* 440 U.S. 908, 99 S.Ct. 1216, 59 L.Ed.2d 456 (1979), this Court held that police could affix a beeper to the outside of an automobile if they had probable cause to believe that it would lead to evidence of a crime and exigent circumstances prevented them from obtaining a warrant. *Shovea* recognizes the instrusive nature of the presence of a beeper on personal property; its rule accounts for the lessened expectation of privacy generally associated with automobiles. See also *United States v. Moore*, 562 F.2d at 112-13 (applying probable cause standard for automobiles but requiring warrant for monitoring of box of chemicals).

[3] Even cases relying strictly on the physical intrusion of installation prior to ownership recognize the concept of intrusion that underlies our holding.

> "[S]ince the Government owned the chemicals at the time it installed the beeper, its consent obviated any potential warrant requirement. However, ... the consent of the Government could not satisfy the fourth amendment after ownership and control of the chemicals passed to the defendants. *See United States v. Moore*, *supra*, 562 F.2d at 111; *United States v. Clayborne*, *supra*, 584 F.2d [346] at 349 & n. 1 [(10th Cir. 1978)]. The Government's proposed expansion of the consent exception would allow warrantless installation and monitoring of the beepers or even radio transmitters in any property the Government might decide to sell."

*United States v. Bailey*, 628 F.2d at 943 n. 7.

to permit the police to periodically open and search the suitcase after it comes under the ownership of another. Therefore, we hold that before the government agents could transfer the can of ether containing a beeper to Karo, they had to obtain an authorizing warrant.[4]

We also must determine whether the defendants' legitimate expectations of privacy were violated by the action of the goverment in monitoring the beeper. In *United States v. Knotts*, ____ U.S. ____ , 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), officials tracked a drum of chloroform containing a beeper from the place of its purchase, through an automobile trip, to its burial under a barrel outside a cabin owned by one of the defendants. The Court held that no unlawful search or seizure had occurred because no legitimate expectation of privacy of the defendants had been invaded. *Id.* at ____ , 103 S.Ct. at 1087. In reaching that conclusion the Court relied in large part on the reduced expectation of privacy enjoyed by travelers on public roads. The Court noted that nothing in the record indicated that the beeper was used after the drum had been located in the area of the cabin. It emphasized that visual surveillance from public places along the route or adjoining the premises would have revealed all of the same facts to the police: the beeper was not used "in any way to reveal information ... that would not have been visible to the naked eye from outside the cabin." *Id.* at ____ , 103 S.Ct. at 1087.

In the case before us the beeper was monitored while the can was within private residences and storage lockers. The beeper gave law enforcement officials information that could not be discovered by ordinary visual surveillance, even had that surveillance been constant. The

---

[4] While we only discuss Karo's interest in the can of ether, we do not foreclose the possibility that others also may have legitimate expectations of privacy in the object at the time of transfer.

*Knotts* case involved surveillance over only a few days; monitoring in the instant case took place over five months. In *Knotts* the drum was never inside a residence; here the ether was inside four residences. In *Knotts* the officers lost track of the automobile carrying the drum once on the public highway; here the officers lost track on the ether can for significant periods of time, after the ether had come to rest in residences and a rented locker. In the instant case, most of the tracing to new locations was possible ony by use of the direction finder to locate the beeper.

The monitoring of the beeper in the instant case was a different type of intrusion than that in *Knotts*, touching upon privacy interests that historically have been protected by the Fourth Amendment. We hold that the warrantless use of a beeper to monitor the location of noncontraband withdrawn from public view inside private residences or similarly protected places is an unconstitutional search or seizure. We agree with the statement of the court in *United States v. Moore*, 562 F.2d 106 (1st Cir. 1977), *cert. denied*, 435 U.S. 926, 98 S.Ct. 1493, 55 L.Ed.2d 521 (1978):

> "When defendants withdrew from the public view, taking the box of chemicals with them, they had every right to expect that their activities inside the house which they sought to preserve as private would be free from warrantless intrusion by the Government. Doubtless the limited data transmitted by a beeper was far less revealing than the conversation recorded in *Katz;* the level of intrusion was less severe. Still, as the chemicals containing the transmitter were not contraband or otherwise wrongfully in appellees' possession, the Government had no right to determine their continued presence in the house by use of warrantless electronic surveillance."

*Id.* at 113; see also *United States v. Bailey*, 628 F.2d 938, 940 (6th Cir. 1980) ("If the individual legitimately

expected the information or material the Government acquired to remain private, the act of the Government acquiring that information or material constitutes a search or seizure for fourth amendment purposes."); *United States v. Clayborne*, 584 F.2d 346, 351 n. 3 (10th Cir. 1978). *Contra United States v. Bernard*, 625 F.2d 854, 861 (9th Cir. 1980). Legitimate expectations of privacy were violated by the monitoring of the beeper while the can of ether with the beeper attached was located in the defendants' private residences and storage lockers. That the can also traveled by motor vehicle and may not have been protected during such travel does not require a different result. The district court correctly concluded that the government's conduct in monitoring the beeper without a valid warrant was unlawful.

III

Evidence seized pursuant to the search warrant for the Taos residence may be suppressed only if that evidence is tainted by the prior illegal conduct of the government. The test for determining whether evidence derived from prior illegal conduct of the government must be suppressed pursuant to the exclusionary rule was set forth in *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963):

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' "

*Id.* at 488, 83 S.Ct. at 417. The government contends that the evidence from the search of the Taos residence was obtained by means independent of the beeper in-

stallation and monitoring. The government argues that during some of the time the beeper was being monitored, the defendants were also under physical surveillance. This argument would be convincing if the government could show that the location of the ether had been determined at all times without the aid of the beeper. This it has not alleged nor could it. The record makes clear that several times during the monitoring of the beeper the government agents lost track of the ether and ascertained its location only by use of the beeper. The claim that the agents could smell the ether while it was locked within the residences and the storage lockers is similarly unpersuasive: the agents were in a position to smell the ether only because the beeper had revealed its location.

To the extent that the affidavit filed in support of the search warrant for the Taos residence relied on information supplied by the illegal conduct of the government, there is a link between the prior illegality and the search warrant. The evidence seized from the search of the residence is directly tied to the prior illegal monitoring: without that illegal monitoring the government agents would not have arrived at the Taos residence or known that the ether was within the house. When that information is excised, the search warrant for the Taos residence must fall.

IV

The government contends that even if the warrantless installation and monitoring of the beeper was unlawful, the court's order suppressing the evidence seized from the Taos residence as to all the defendants was in error. The government claims that not all of the defendants have demonstrated the invasion of a legitimate expectation of privacy.

The district court held that each defendant experienced the invasion of a legitimate expectation of privacy and could suppress the evidence seized from the

Taos residence.[5] We agree that the Fourth Amendment rights of Karo, Horton, Harley, Steele, and Roth were violated. The beeper was monitored within the Taos residence jointly rented by Steele, Horton, and Harley. One has a legitimate expectation of privacy within one's home, *Mancusi v. DeForte*, 392 U.S. 364, 369, 88 S.Ct. 2120, 2124, 20 L.Ed.2d 1154 (1968), as well as within a residence shared with others, *United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978). Roth did not rent the Taos house with Steel, Horton, and Harley, but he was a visitor at the house when the search warrant was executed. He had resided there for several days and nights and he had unrestricted access to the house. He therefore had a legitimate expectation of privacy in the house. See *Rakas v. Illinois*, 439 U.S. 128, 140, 149, 99 S.Ct. 421, 428, 433, 58 L.Ed.2d 387 (1978); *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960); *United States v. Robertson*, 606 F.2d 853, 858 n. 2 (9th Cir. 1979). The evidence seized from the Taos residence should be suppressed as to Horton Harley, Steele, and Roth.

Neither Karo nor Rhodes has demonstrated a legitimate expectation of privacy in the Taos residence; they

---

[5] In ruling that all of the defendants could challenge the conduct of the government, the district judge stated:

> "Now, as far as standing, in my view, the installation of a beeper is a continuing search. It's not just a search when it's put on the can on the loading dock, or wherever, it's a search wherever that can is tracing. And that's the purpose of the whole thing, is—and as is evident in this case, it did a good job. I say, accordingly, I think each person has standing, has demonstrated standing to challenge, except maybe the Defendant Roth is the only one I have a question about in that regard. Everyone else has demonstrated some connection with, or expectation of privacy where the can was intruded. Some have demonstrated ownership or possession of it. But rather than further complicate the situation, I will just grant the motion to suppress as to all of the Defendants."

can seek suppression of the evidence seized from that residence only if they can demonstrate that that evidence is tainted by prior illegal conduct violating their rights. Karo's right to own and possess the ether without the presence of electronic devices was violated by the illegal installation. The installation of the beeper is inextricably intertwined with the later illegal monitoring of the beeper, including that monitoring directly tied to the search of the Taos residence. Therefore, the evidence seized from that house is tainted by prior illegality infringing on the rights of Karo, and the suppression order for the evidence seized at that house was correct as to him.[6]

While the district court held that Rhodes could challenge the conduct of the government, the court made no factual findings from which we can review that determination. The record does not establish that the beeper was monitored in any place in which Rhodes had a legitimate expectation of privacy. Rhodes did not establish any possessory interest in the ether violated by the in-

---

[6] The government, relying on *United States v. Clayborne*, 584 F.2d 346 (10th Cir. 1978), claims that a break in the monitoring served to purge the evidence seized of the taint of the primary illegality. The government asserts that this break occurred when it lost contact with the beeper. However, we do not read *Clayborne* to declare that a simple lapse in monitoring would purge searches occurring thereafter from the taint of illegal monitoring occurring prior to the lapse. That would afford too little protection to the right to be free from warrantless beeper surveillance in places protected by the Fourth Amendment. Law enforcement officials could simply create a lapse by periodically turning off the monitoring device; police would have unfettered discretion in determining when to monitor the inside of private residences and how to redress warrantless monitoring. Further, in the instant case the government cannot point to a break between the illegal monitoring of the second storage locker and the Taos house. Consequently, all evidence obtained subsequent to the illegal monitoring of the second storage locker is tainted in any event.

stallation of the beeper. Therefore, on the basis of this record, the evidence cannot be suppressed as to Rhodes.

We reverse the district court's suppression of evidence as to Rhodes. In all other aspects, the judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

---

UNITED STATES OF AMERICA, PLAINTIFF,

*vs.*

JAMES CONNORS KARO, ET AL., DEFENDANTS.

CRIM NO. 81-21

[Filed Jul 10 1981]

MEMORANDUM OPINION

This matter comes before the Court on the motion of the United States to reconsider and set aside the Order of May 22, 1981 granting defendants' motion to suppress evidence. All evidence which was the fruit of the installation of an electronic tracking device to follow a quantity of ether pursuant to the Order of September 10, 1980 was thereby suppressed. Included as fruit of the electronic tracking device was evidence derived from the installation of "entry tone alarms" in storage lockers in Albuquerque, New Mexico and the search of a house in Taos, New Mexico.

The Court has considered the motion and the memoranda filed in support of, and opposing, the motion to reconsider and finds that it is not well taken. It will therefore be denied.

The Government bases its motion to reconsider on two grounds. One of its contentions is that, in this case, the installation of an electronic tracking device (a "beeper") on the ether container was not an intrusion which required the authority of a warrant issued upon a sworn showing of probable cause. As authority for that

proposition, the Government cites *United States v. Michael*, 645 F.2d 252 (5th Cir. 1981).

In *Michael*, the Fifth Circuit found no violations of a defendant's Fourth Amendment rights from the installation of a warrantless beeper installed on the exterior of his van. The Court held the "minimal intrusion involved in [the] attachment of a beeper to [a defendant's] van, parked in a public place, was sufficiently justified so as to satisfy any of [his] fourth amendment expectation of privacy concerns." *Id.* at 256. The Fifth Circuit's position is not unique, however. Other Circuits, including the Tenth, have also adopted the position that warrantless beeper surveillance for the purpose of monitoring vehicles along public roads is valid. *See, e.g., United States v. Shovea*, 580 F.2d 1382 (10th Cir. 1978), *cert. den.*, 440 U.S. 908 (1979); *United States v. Moore*, 562 F.2d 106 (1st Cir. 1977). As the Fifth Circuit noted in *Michael*, the United States Supreme Court has recognized "significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts." 645 F.2d at 257, *citing United States v. Chadwick*, 433 U.S. 1, 12 (1977).

The beeper surveillance in this case went far beyond the monitoring of a vehicle along a public road. The evidence adduced at the suppression hearing established that a beeper was installed in a container of ether which had been ordered by some of the defendants; the ether was subsequently taken by various defendants into at least three private homes, two storage lockers rented by the defendants and finally to a residence in Taos, New Mexico. *United States v. Michael* is therefore inapposite to the facts present here.

The First Circuit, however, has had occasion to consider the question before this Court in *United States v. Moore*, 562 F.2d 106 (1977). In that case, federal agents

had installed a beeper in a cardboard box containing chemicals ordered by the defendants. A second beeper was attached to the defendants' van after they took delivery of the chemicals. Using those beepers in part, the agents followed the defendants to a house and then used the beeper in the box of chemicals to monitor the presence of the chemicals in that house. The agents subsequently obtained a search warrant; the search revealed a number of chemicals and apparatus used in manufacturing controlled substances.

The Court distinguished between the use of a beeper to track a vehicle and the use of one to monitor the continued presence of chemicals in a private home. Finding that once the defendants left the vehicle and entered the house a right of privacy existed free from warrantless intrusion by the government, the Court held that the use of the beeper to monitor the presence of chemicals in the house was an invasion of the privacy of the home. *Id.* at 113.

The Tenth Circuit faced a similar question in *United States v. Clayborne*, 584 F.2d 346 (1978). There, DEA agents installed a warrantless beeper on the inside of a drum of ether ordered by one of the defendants. The defendant subsequently took delivery of the drum and transported it to his house. The agents were able to periodically monitor its presence in his home. During one of those periodic checks, the agent found that the drum was no longer at the defendant's home; independent effort (i.e airplane surveillance) was necessary to reestablish contact. The beeper signal was located at a commercial premises leased by a second defendant and used by defendants as an illicit drug laboratory.

The Tenth Circuit upheld the trial court's decision not to suppress evidence seized from the laboratory. In so during the Court distinguished its decision from that of the First Circuit in *United States v. Moore*. Citing the special facts before it in *Clayborne*, the Tenth Cir-

cuit held that only a slight intrusion, which did not constitute a per se violation of the Fourth Amendment, had occurred and that the use of the beeper without a warrant in that case was not invalid. *Id.* at 351. The Court based its holding on its finding that the beeper surveillance of evidence within the house and that within the laboratory were *not* connected transactions. Thus, the laboratory contact was not tainted by the surveillance within the house. Moreover, the Court found that the privacy to be expected in the laboratory, located in a commercial establishment susceptible to outside viewing as well as public ingress and egress, was not the same as properly would be expected in a home. *Id.* at 350.

This Court's May 22, 1981 Order suppressing the evidence discovered and subsequently seized as a result of the warrantless electronic surveillance of the ether container in the case at bar is in accord with *United States v. Clayborne*. The crucial difference between that case and this one is that, in the instant case, the beeper surveillance within the private homes to which the container of ether was taken and that within the storage lockers and the house in Taos are all one "connected transaction." *Clayborne*, 584 F.2d at 349. Consequently, all contacts with the can of ether which occurred after it was picked up by one of the defendants and taken inside the first private home are tainted.[1] The container

---

[1] In United States v. Moore, the First Circuit held that the fact that the defendants initially had no rights in the containers of chemicals was of no significance because they later obtained lawful possession and the agents sought to use the electronic surveillance devices after the defendants obtained that possession. *Moore*, 562 F.2d at 111. It is noteworthy, in light of this Court's holding to that effect at the conclusion of the suppression hearing, that in *Clayborne* the Tenth Circuit indicated that if the proposition had been argued, it would have taken the same position on that point as did the First Circuit. *Clayborne*, 584 F.2d at 349 n.1.

of ether in question here was monitored for a period of several months. During that period the ether was taken into at least three private residences and two storage lockers rented by one or more of the defendants before ultimately being taken to the residence at Taos where the laboratory equipment and drugs were seized. The warrantless electronic surveillance of the houses was impermissible, because the Fourth Amendment clearly protects interiors of private homes from such intrusions. *Id.* at 351. A valid warrant was therefore required in this case to monitor the electronic beeper's signals after ownership and possession had passed to the defendants. *United States v. Bailey*, 628 F.2d 938 (6th Cir. 1980).

The United States also contends that the Court erred in its oral ruling on May 12, 1981 when it found that a conflict existed between the testimony of the witnesses DEA Agent Rottinger and Assistant United States Attorney Blackmer over whether the issuing Judge was apprised of the fact that Carl Muehlenweg was a cooperating witness rather than a suspect at the time the application for the order authorizing the use of a beeper was made. At the time of the hearing, the Court was of the impression that there were basic conflicts in the testimony of the DEA Agent and the Assistant United States Attorney as to that point. On that basis, the Court indicated that if it were important, the Court would find that the issuing Judge was not told. However, a review of the transcript reflects that the testimony of the Agent and the United States Attorney were in general agreement as to that point; both indicated that the Judge had been advised of Muehlenweg's status.

That fact, even if assumed to be true, is of no significance in this case. The affidavit was incorrect on its face. It identified Carl Muehlenweg and other unnamed confederates as targets of the investigation. Moreover,

without identifying the incidents as such, the affidavit described the execution of two previous search warrants on drug laboratories which were in no way connected with the then current investigation of the target suspects. The evidence adduced at the suppression hearing estabished that those searches occurred several months earlier and were unrelated to this investigation. That fact appears nowhere on the face of the affidavit. Although the testimony of Rottinger and Blackmer is in agreement that the issuing Judge was told of Muehlenweg's cooperation, the evidence established that those statements, if made, were not sworn to or recorded. An affidavit cannot be so corrected. Unsworn and unrecorded testimony of an affiant before the issuing Judge cannot be considered in determining probable cause for the issuance of a search warrant. *See United States v. Hittle*, 575 F.2d 799 (10th Cir. 1978); Fed.R.Crim.P. 41(c).

It must be clearly noted that the Court is not finding that the off-the-record statements claimed to have been made by the Assistant United States Attorney and the DEA Agent were in fact made to the issuing Judge. Such a determinination is unnecessary under the law. Were such a determination necessary, however, the Government has, by pursuing this course of action, created the untenable situation where the facts as to what transpired could only be resolved by the testimony or affidavit of the issuing Judge.[2] Such a situation cannot even be comtemplated, for it would create the impossible situation where one Judge would be called on to pass on the credibility of another.

It is therefore concluded that the affidavit contains material false and misleading statements and that it was made knowingly and intentionally. In so finding,

---

[2] Indeed in this case the defendants offered to obtain a statement or affidavit from the issuing Judge, which offer was refused by the Court.

the Court is mindful of the admonition that affidavits be judged in a "common sense and realistic manner, and warrants issued thereon should not be interpreted hypertechnically." *United States v. Berry*, 423 F.2d 142, 144 (10th Cir. 1970). No matter how worthy its original intentions in proceeding in this manner, as the architect of this dilemma the Government must suffer the consequences of its own error in judgment. On its face the afidavit is false. Once the incorrect and misleading portions of the affidavit are purged, *Franks v. Delaware*, 438 U.S. 154 (1978); *United States v. Axselle*, 604 F.2d 1330 (10th Cir. 1979), the remaining content is not sufficient to establish probable cause. While this is a classic case demonstrating the harshness of the exclusionary rule, the result is clear. The evidence must be suppressed.

/s/ HOWARD C. BRATTON
*Chief Judge*

**APPENDIX C**

## UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MAY TERM - June 20, 1983

Before Honorable Robert H. McWilliams, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Court Judges.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

*vs.*

JAMES CONNORS KARO, RICHARD MILES HORTON, WILLIAM ROBERTSON HARLEY, MICHAEL GAYLORD STEELE AND EVAN ROTH, DEFENDANTS-APPELLEES.

**JUDGMENT**

Nos. 81-1899, 81-1902, 81-1903, 81-1904, 81-1905

(D. C. # CR 81-21)

This cause came on to be heard on the record on appeal from the United States District Court for the District of New Mexico, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, *Clerk*

## APPENDIX D

JULY TERM - August 26, 1983

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

*vs.*

JAMES CONNORS KARO, ET AL,
DEFENDANTS-APPELLEES.

No. 81-1899, 81-1902, 81-1903, 81-1904, 81-1905, 81-1906

This matter comes on for consideration of the petition for rehearing filed by Appellee Gene H. Rhodes in case No. 81-1906, and appellant's petition for rehearing and suggestion for rehearing in banc in the captioned cause.

Upon consideration whereof, the petitions for rehearing are denied by the panel that rendered the decision sought to be reheard.

The petitions for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, *Clerk*

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

---

UNITED STATES OF AMERICA, PLAINTIFF,

*vs.*

JAMES CONNORS KARO, RICHARD MILES HORTON, WILLIAM ROBERTSON HARLEY, MICHAEL GAYLORD STEELE, and EVAN ROTH, DEFENDANTS.

Criminal No. 81-21

[Filed May 22 1981]

**ORDER**

Upon consideration of the defendants' motions to suppress evidence, and after hearing evidence and argument thereon, and upon the basis of the findings made in open court,

IT IS ORDERED that all evidence which is the fruit of the installation of an electronic tracking device to follow a quantity of ether pursuant to the Order of September 10, 1980, be and it is hereby suppressed as evidence as to all defendants.

Included in the above order as fruit of the electronic tracking device is evidence derived from the installation of "entry tone alarms" in storage lockers in Albuquerque, New Mexico and the search of a house in Taos, New Mexico,

/S/ HOWARD C. BRATTON
*Chief Judge*

APPENDIX F

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

---

UNITED STATES OF AMERICA, PLAINTIFF,

*vs.*

JAMES CONNORS KARO, ET AL., DEFENDANTS.

CRIM NO. 81-21

[Filed Jul 10 1981]

### ORDER

This matter comes before the Court on the motion of the United States to reconsider and set aside the Order of May 22, 1981 granting defendants' motion to suppress evidence. The Court has considered the motion and entered a Memorandum Opinion herein, and concludes that the motion is not well taken. It will therefore be denied. NOW, THEREFORE,

IT IS ORDERED that the motion of the United States to reconsider and set aside the Court's Order of May 22, 1981 be, and hereby is, denied.

/S/ HOWARD C. BRATTON
*United States District Judge*

No. 83-850

# In the Supreme Court of the United States

OCTOBER TERM, 1983

Supreme Court, U.S.
FILED
MAR 9 1984
ALEXANDER L. STEVAS
CLERK

UNITED STATES OF AMERICA, PETITIONER

*v.*

JAMES CONNORS KARO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## JOINT APPENDIX

JAMES BEAM
715 Tijeras, N.W.
Albuquerque, NM 87102
(505) 842-5924

JOSEPH (SIB) ABRAHAM, JR.
CHARLES LOUIS ROBERTS
P.O. Box D
El Paso, TX 79901-0004
(915) 544-7860

WILLIAM MARCHIONDO
P.O. Box 568
Albuquerque, NM 87103
(505) 247-0751

REBER BOULT
1412 Lomas Blvd., N.W.
Albuquerque, NM 87102
(505) 842-0392

NANCY HOLLANDER
FREEDMAN, BOYD & DANIELS, P.A.
20 First Plaza, Suite 212
Albuquerque, NM 87102
(505) 842-9960
*Counsel for Respondents*

REX E. LEE
Solicitor General
Department of Justice
Washington, DC 20530
(202) 633-2217
*Counsel for Petitioner*

**PETITION FOR WRIT OF CERTIORARI FILED NOVEMBER 22, 1983**
**CERTIORARI GRANTED JANUARY 16, 1984**

TABLE OF CONTENTS


| | Page |
|---|---|
| Relevant docket entries | 1 |
| Indictment (Criminal No. 82-21) | 32 |
| Joint motion to suppress evidence, with selected exhibits | 35 |
| Transcript of suppression hearing | 63 |
| Testimony of Richard Rottinger, DEA Special Agent | 63 |
| Testimony of Robert Hastings, DEA Special Agent | 94 |
| Testimony of Michael Ronsiek, chemicals salesman | 106 |
| Testimony of Richard Rottinger (continued) | 109 |
| Testimony of James Blackmer, Assistant U.S. Attorney | 130 |
| Testimony of Respondent Horton | 143 |
| Testimony of Respondent Harley | 145 |
| Testimony of Respondent Steele | 148 |
| Testimony of Carl Muehlenweg, government informant | 149 |
| Testimony of Respondent Rhodes | 153 |
| Oral suppression ruling, May 22, 1981 | 155 |
| Order allowing certiorari | 159 |

UNITED STATES DISTRICT COURT

No. 81-00021

UNITED STATES

*v.*

JAMES CONNORS KARO

| | |
|---|---|
| 21:846 | Conspiracy (Ct. I) |
| 21:841(a)(1) | Possession with Intent to Distribute Cocaine (Ct. II III) |
| 18:2 | Aiding and Abetting |
| 21:846 | Conspiracy (Ct. I) |
| 21:841(a)(1) | Possession with Intent to Distribute Cocaine (Ct. II, III) |
| 18:2 | Aiding and Abetting |

DOCKET ENTRIES

| Date | Nr. | Proceedings |
|---|---|---|
| | | MAGISTRATE PAPERS: |
| 2/17/81 | | CONDS OF REL—PR with restr.<br>KARO: 1108 Monroe, S. E.<br>Albuquerque, NM 87108 |
| 2/9/81 | | AFFIDAVIT FOR SEARCH WARRANT & SEARCH WARRANT. |
| 2/11/81 | 1 | INDICTMENT. |
| 2/12/81 | | WARRANT issued and delivered to USM. |
| 2/17/81 | | ARRAIGNMENT set 2/19/81, at 11 before Mag. |
| 2/17/81 | | WARRANT, return exec. 2/17/81. |
| 2/19/81 | 2 | ENTRY OF APPEARANCE by Mr. Boyd. |

| Date | Nr. | Proceedings |
|---|---|---|
| 2/19/81 | | ARRAIGNMENT. Counsel present. Plea of NG. Trial set 3/30/81, at 9:30 a.m., before HCB. Ten days to file motions. Gallagher |
| 2/26/81 | 10 | MINUTE ORDER that Deft is granted extension of time to 3/12/81, to file motions; further that Govt respond to Defts' motions by 3/19/81; and motions hearing set for 3/23/81, at 9:30 a.m. (JC:krg) CTC |
| 2/26/81 | 12 | MOTION by Deft for Extension of Time to File Motions. |
| 3/3/81 | | RECEIPT by Jackson J. Rupe, passport belonging to Deft. |
| 3-5-81 | | Notice of jury trial of 3-30-81 mailed. |
| 3/9/81 | 16 | MOTION by Govt for issuance of subponea tecum in form as attached thereto. |
| 3/12/81 | 19 | ORDER that Clerk is directed to permit respective counsel, as well as Dr. Blackwell to UNM Institute of Applied Research Services to examine jury selection records. (JC) CTC EOD: 3/13/81 |
| | 20 | JOINT SPECIAL MOTION by Deft to Suppress. |
| | 21 | MEMORANDUM in Support of Motion to Suppress. |
| | 22 | JOINT MOTION by Deft to Dismiss. |
| | 23 | MEMORANDUM in Support of Motion to Dismiss. |
| | 24 | JOINT MOTION by Deft to Disclose Confidential Informants and/or Undercover Govt Agents. |
| | 25 | MEMORANDUM BRIEF in Support of Motion to Disclose. |

| Date | Nr. | Proceedings |
|---|---|---|
| | 26 | JOINT MOTION by Deft for Disclosure, Inspection & Discovery. |
| | 27 | MEMORANDUM BRIEF in Support of Motion for Disclosure. |
| | 28 | JOINT MOTION by Deft for Bill of Particulars. |
| | 29 | MEMORANDUM BRIEF in Support of Motion for Bill of Particulars. |
| | 30 | JOINT MOTION by Deft for Govt Disclosure of Full Extent of Electronic Surveillance and Fourth Amendment Intrusions. |
| | 31 | MEMORANDUM BRIEF in Support of Motion for Govt Disclosure. |
| | 32 | JOINT MOTION by Deft to Suppress Evidence. |
| | 33 | MEMORANDUM in Support of Motion to Suppress. |
| | 34 | JOINT MOTION by Deft for Unsealing and Production of Further Court Documents Re Electronic Surveillance and Fourth Amendment Intrusions. |
| 3/12/81 | 35 | MOTION by Deft for Leave to File Additional Motions. |
| 3/12/81 | 36 | MOTION by Deft to Sever Counts and Defendants. |
| | 37 | MEMORANDUM BRIEF in Support of Motion to Sever. |
| 3/19/81 | | MOTION hearing of 3/23/81 vacated by telephone. |
| 3/19/81 | 49 | RESPONSE by Govt to Defense Motions. |
| 3/25/81 | 51 | SUPERSEDING INDICTMENT. |
| 3/26/81 | | SUMMONS issued for appearance 4/2/81, at 11 before Mag. |

| Date | Nr. | Proceedings |
|---|---|---|
| 3/26/81 | | ARRAIGNMENT. Counsel present but Deft not present. Counsel enter plea of NOT GUILTY for Deft to Superseding Indictment. Present Conds of Rel to remain. New Motions to be filed by 4/10/81. HCB |
| | | USM advised not to serve summons. |
| 4-2-81 | | Hearing on pending motions 5-4-81, at 9:30 A.M. Notice to parties. |
| 4-2-81 | | Jury trial Mon., June 1, 1981, 9:30 A.M. Notice mailed. |
| 4/2/81 | 52 | ORDER that Deft produce any U.S. passport he has by 4/24/81, to Clerk of this Court, which passport(s) shall be sealed by the Clerk and remain in custody of Clerk until further order of Court at trial, and that a subpoena duces tecum under Rule 17(c) FRCP be issued and served. (HCB) |
| | | EOD: 4/2/81 CTC & Deft. One copy to Clerk. |
| 4/9/81 | | Passport #H1527958 received 4/9/81 and lodged in safe in Clerk's Office. See Jesse Casaus for return of same upon Order of the Court. |
| 4-9-81 | | Motion hearing changed to 5-11-81, 9:30 A.M. Notice sent. |
| 5-11-81 | | 9:30 A.M. Called for hearing on pending motions. Deft. present and by John W. Boyd and Nancy Hollander, retained counsel; Govt by Richard J. Smith and Larry Gomez. Evidence presented. 5:10 P.M. Recess to 9:00 A.M. tomorrow. |
| 5-12-81 | | 9:00 A.M. Second day of motion hearing. Appearances as on first day. Court makes ruling in open court. 3:00 P.M. Recess. |
| | | **Bratton, J.** **Rptr: Meier** |

| Date | Nr. | Proceedings |
|---|---|---|
| 5/22/81 | 65 | ORDER that all evidence which is the fruit of the installation of an electronic tracking device to follow a quantity of ether pursuant to the Order of 9/10/80 is suppressed as evidence; and included in the above order as fruit of the electronic tracking device is evidence derived from the installation of "entry tone alarms" in storage lockers in Alb, NM and the search of a house in Taos, NM. (HCB) EOD: 5/22/81, CTC. |
| 6/19/81 | 69 | MOTION by Govt to Reconsider and Set Aside Order. |
| 6/29/81 | 70 | JOINT RESPONSE by Defts to Pltf's Motion to Reconsider and Set Aside Order. |
| 7/10/81 | 71 | ORDER that the Motion by govt. to reconsider and set aside the Order of 5/22/81 granting deft. Motion to Suppress Evidence is denied. (HCB) EOD: 7/10/81 CC: CTC, U.S. Atty. |
| 7/10/81 | 72 | MEMORANDUM OPINION<br>(HCB) EOD: 7/10/81 CC: CTC, U.S. Atty. |
| 8/6/81 | 73 | NOTICE OF APPEAL by Plaintiff of the Order of 7/10/81 and 5/22/81.<br><br>Distribution on NOA as follows:<br><br>To Deft: Copy of NOA.<br>To USCA: Copy of NOA, docket entries & Desig. ltr.<br>To Appellant: Copy of NOA, docket entries w/cert of desig attached; transcript order form, desig ltr setting conference for 8/13/81 at 10:00 a.m. USCA form ltr No. L-2 & L-2(a) (docketing statement instrs). |

| Date | Nr. | Proceedings |
|---|---|---|
| | | To Appellee: Copy of NOA, copy of docket entires w/cert of desig attached, & design ltr setting confference.<br>To Court Reporter: Copy of NOA, docket entries & desig ltr.<br>To Judge: Copy of NOA.<br>To USM: Copy of NOA. |
| 8/10/81 | 74 | ORDER correcting Order of 7/10/81 and adding name of deft. Gene R. Rhodes to caption of that Order.<br><br>(HCB) EOD: 8/10/81<br>CTC, USA, USM, Deft., Prob. |

UNITED STATES DISTRICT COURT

No. 81-00021

UNITED STATES

*v.*

RICHARD MILES HORTON

| | |
|---|---|
| 21:846 | Conspiracy (Ct. I) |
| 21:841(a)(1) | Possession with Intent to Distribute Cocaine (Ct. IV) |
| 18:2 | Aiding and Abetting |
| 21:846 | Conspiracy (Ct. I) |
| 21:841(a)(1) | Possession with Intent to Distribute Cocaine (Ct. IV) |
| 18:2 | Aiding and Abetting |

DOCKET ENTRIES

| Date | Nr. | Proceedings |
|---|---|---|
| | | MAGISTRATE PAPERS: |
| 2/10/81 | | COMPLAINT |
| | | CONDS. OF RELEASE—$15,000 c/s<br>APPEARANCE BOND ($15,000 cashiers check) |
| | | HORTON: 315 Wellesley Place, N.E.<br>Albuquerque, NM 87106 |
| | | CASH ACKNOWLEDGMENT. |
| 2/9/81 | | AFFIDAVIT FOR SEARCH WARRANT & SEARCH WARRANT. |

| Date | Nr. | Proceedings |
|---|---|---|
| 2/13/81 | | ORDER that Deft be allowed to substitute $15,000 surety bond for $15,000 cash bond on deposit with Clerk. (Gallagher) Check issued payable to mother. |
| 2/9/81 | | AFFIDAVIT FOR SEARCH WARRANT & SEARCH WARRANT. |
| 2/19/81 | | APPEARANCE BOND. (Surety bond substituted for cash deposited in registry)<br>Surety: Joe J. Baca (Baca Bonding Corp.)<br>1918 Broadway, N.E.<br>Albuquerque, NM |
| 2/11/81 | 1 | INDICTMENT. |
| 2/12/81 | | ARRAIGNMENT set 2/19/81, at 11 before Mag. |
| 2/19/81 | | ARRAIGNMENT. Counsel present. Plea of NG. Trial set 3/30/81, at 9:30 a.m., before HCB. Ten days to file motions.<br>Gallagher |
| 2/19/81 | 4 | ENTRY OF APPEARANCE by Mr. Marchiondo. |
| 2/23/81 | 6 | MOTION by Deft for Enlargement of Time to file motions. |
| | 7 | MEMORANDUM in Support of Motion for Enlargement of Time. |
| 2/25/81 | 8 | MINUTE ORDER that Deft is granted extension of time to 3/6/81, to file motions. (JC: krg) CTC |
| 2/26/81 | 10 | MINUTE ORDER that Deft is granted extension of time to 3/12/81, to file motions; further that Govt respond to Defts' motions by 3/19/81; and motions hearing set for 3/23/81, at 9:30 a.b. (JC:krg) CTC |
| 3-5-81 | | Notice of jury trial of 3-30-81 mailed. |

| Date | Nr. | Proceedings |
|---|---|---|
| 3/5/81 | 13 | MOTION by Deft for Enlargement of Time re Trial. |
| | 14 | MOTION by Deft to adopt. |
| 3/9/81 | 16 | MOTION by Govt for issuance of subpoena duces tecum in form as attached thereto. |
| 3/12/81 | 19 | ORDER that Clerk is directed to permit respective counsel, as well as Dr. Blackwell of UNM Institute of Applied Research Services to examine jury selection records. (JC) CTC EOD: 3/13/81 |
| | 20 | JOINT SPECIAL MOTION by Deft to Suppress. |
| | 21 | MEMORANDUM in Support of Motion to Suppress. |
| | 22 | JOINT MOTION by Deft to Dismiss. |
| | 23 | MEMORANDUM in Support of Motion to Dismiss. |
| | 24 | JOINT MOTION by Deft to Disclose Confidential Informants and/or Undercover Govt Agents. |
| | 25 | MEMORANDUM BRIEF in Support of Motion to Disclose. |
| | 26 | JOINT MOTION by Deft for Disclosure, Inspection & Discovery. |
| | 27 | MEMORANDUM BRIEF in Support of Motion for Disclosure. |
| | 28 | JOINT MOTION by Deft for Bill of Particulars. |
| | 29 | MEMORANDUM BRIEF in Support of Motion for Bill of Particulars. |
| | 30 | JOINT MOTION by Deft for Govt Disclosure of Full Extent of Electronic Surveillance and Fourth Amendment Intrusions. |

| Date | Nr. | Proceedings |
|---|---|---|
| | 31 | MEMORANDUM BRIEF in Support of Motion for Govt Disclosure. |
| | 32 | JOINT MOTION by Deft to Suppress Evidence. |
| | 33 | MEMORANDUM in Support of Motion to Suppress. |
| | 34 | JOINT MOTION by Deft for Unsealing and Production of Further Court Documents Re Electronic Surveillance and Fourth Amendment Intrusions. |
| 3/12/81 | 35 | MOTION by Deft for Leave to File Additional Motions. |
| 3/12/81 | 38 | MOTION by Deft to Suppress. |
| | 39 | MEMORANDUM in Support of Motion to Suppress. |
| 3/12/81 | 46 | MOTION by Deft for Severance from Deft Karo. |
| | 47 | MEMORANDUM in Support of Motion for Severance. |
| 3-19-81 | | Motion hearing of 3-23-81 vacated by telephone. |
| 3/19/81 | 49 | RESPONSE by Govt to Defense Motions. |
| 3/25/81 | 51 | SUPERSEDING INDICTMENT. |
| 3/26/81 | | SUMMONS issued for appearance 4/2/81, at 11 before Mag. |
| 3/26/81 | | ARRAIGNMENT. Counsel present but Deft not present. Counsel enter plea of NOT GUILTY for Deft to Superseding Indictment. Present Conds of Rel to remain. New Motions to be filed by 4/10/81. HCB |
| | | USM advised not to serve summons. |
| 4-2-81 | | Hearing on pending motions, Mon., 5-4-81, 9:30 A.M. Notice to parties. |

| Date | Nr. | Proceedings |
|---|---|---|
| 4-2-8 | | Jury trial Mon., 6-1-81, 9:30 A.M. Notice mailed. |
| 4/2/81 | 52 | ORDER that Deft produce any U.S. passport he has by 4/24/81, to Clerk of this Court, which passport(s) shall be sealed by the Clerk and remain in custody of Clerk until further order of Court at trial, and that a subpoena duces tecum under Rule 17(c) FRCP be issued and served. (HCB) EOD: 4/2/81 CTC & Deft. One copy to Clerk. |
| 4-9-81 | | Motion hearing changed to 5-11-81. Notice mailed. |
| 5/6/81 | 62 | RESPONSE to Subpoena Duces Tecum by deft. |
| 5-11-81 | | 9:30 A.M. Called for hearing on pending motions. Deft. present and by William C. Marchiondo, retained counsel; Govt by Richard J. Smith and Larry Gomez. Evidence presented. 5:10 P.M. Recess to 9:00 A.M. tomorrow. |
| 5-12-81 | | 9:00 A.M. Second day of motion hearing. Appearances as on first day. Court makes ruling in open court. 3:00 P.M. Recess. |
| | | Bratton, J. Rptr: Meier |
| 5/22/81 | 65 | ORDER that all evidence which is the fruit of the installation of an electronic tracking device to follow a quantity of ether pursuant to the Order of 9/10/80 is suppressed as evidence; and included in the above order as fruit of the electronic tracking device is evidence derived from the installation of "entry tone alarms" in storage lockers in Albuq., NM and the search of a house in Taos, NM. (HCB) EOD: 5/22/81, CTC. |

| Date | Nr. | Proceedings |
|---|---|---|
| 6/19/81 | 69 | MOTION by Govt to Reconsider and Set Aside Order. |
| 6/29/81 | 70 | JOINT RESPONSE by Defts to Pltf's Motion to Reconsider and Set Aside Order. |
| 7/10/81 | 71 | ORDER that the Motion by govt. to reconsider and set aside the Order of 5/22/81 granting deft. Motion to Suppress Evidence is denied. (HCB) EOD: 7/10/81 CC: CTC, U.S. Atty. |
| 7/10/81 | 72 | MEMORANDUM OPINION (HCB) EOD: 7/10/81 CC: U.S. Atty, CTC |
| 8/6/81 | 73 | NOTICE OF APPEAL by Plaintiff of the Order of 7/10/81 & 5/22/81.<br>Distribution of NOA as follows:<br>To Deft: Copy of NOA.<br>To USCA: Copy of NOA, docket entries & desig ltr<br>To Appellant: Copy of NOA, docket entries w/cert of desig attached; transcript order form, desig ltr setting conference for 8/13/81 at 10:00 a.m. USCA form ltr No. L-2 & L-2(a) (docketing statement instrs).<br>To Appellee: Copy of NOA, copy of docket entries w/cert of desig attached, & desig ltr setting conference.<br>To Court Reporter: Copy of NOA, docket entries & desig ltr.<br>To Judge: Copy of NOA.<br>To USM: Copy of NOA. |
| 8/10/81 | 74 | ORDER correcting Order of 7/10/81 and adding name of deft. Gene R. Rhodes to caption of that Order.<br>(HCB) EOD: 8/10/81<br>CTC, USA, USM, Deft., Probation |

UNITED STATES DISTRICT COURT

No. 81-00021

UNITED STATES

*v.*

WILLIAM ROBERTSON HARLEY

| | |
|---|---|
| 21:846 | Conspiracy (Ct. I) |
| 21:841(a)(1) | Possession with Intent to Distribute Cocaine (Ct. IV) |
| 18:2 | Aiding and Abetting |
| 21:846 | Conspiracy (Ct. I) |
| 21:841(a)(1) | Possession with Intent to Distribute Cocaine (Ct. IV) |
| 18:2 | Aiding and Abetting |

DOCKET ENTRIES

| Date | Nr. | Proceedings |
|---|---|---|
| | | MAGISTRATE PAPERS: |
| 2/10/81 | | COMPLAINT<br>CONDS. OF RELEASE ($15,000) |
| 2/11/81 | | APPEARANCE BOND ($15,000 cashiers check)<br>CASH ACKNOWLEDGMENT. (Copy to fiscal)<br>HARLEY: 1301 Bryn Mawr, N.E.<br>Albuquerque, NM 87106<br>Surety: William P. Harley, Jr.<br>(Same address as deft) |

| Date | Nr. | Proceedings |
|---|---|---|
| 2/9/81 | | AFFIDAVIT FOR SEARCH WARRANT & SEARCH WARRANT. |
| 3/12/81 | | MOTION by Deft to Reduce Appearance Bond. (Copy to Mag.) |
| 3/16/81 | | ORDER that Deft's Motion to Reduce Appearance Bond is DENIED. (Gallagher) Copies distributed by Magistrate's Office. |
| 8/3/81 | | ASSIGNMENT OF BOND from Wm. P. Harley to Joseph (Sib) Abraham 8/3/81. |
| 2/11/81 | 1 | INDICTMENT. |
| 2/12/81 | | ARRAIGNMENT set 2/19/81, at 11 before Mag. |
| 2/19/81 | 3 | ENTRY OF APPEARANCE by Mr. Abraham and Mr. Marchiondo. |
| 2/19/81 | | ARRAIGNMENT. Counsel present. Plea of NG. Trial set 3/30/81, at 9:30 a.m., before HCB. Ten days to file motions. Gallagher |
| 2/23/81 | 6 | MOTION by Deft for Enlargement Time to file motions. |
| | 7 | MEMORANDUM in Support of Motion for Enlargement of Time. |
| 2/25/81 | 8 | MINUTE ORDER that Deft is granted extension of time to 3/6/81, to file motions. (JC: krg) CTC |
| 2/26/81 | 10 | MINUTE ORDER that Deft is granted extension of time to 3/12/81, to file motions; further that Govt respond to Defts' motions by 3/19/81; and motions hearing set for 3/23/81, at 9:30 a.m. (JC:krg) CTC |
| 3-5-81 | | Notice of jury trial of 3-30-81 mailed. |
| 3/9/81 | 16 | MOTION by Govt for issuance of subpoena duces tecum in form as attached thereto. |

| Date | Nr. | Proceedings |
|---|---|---|
| 3/12/81 | 19 | ORDER that Clerk is directed to permit respective counsel, as well as Dr. Blackwell of UNM Institute of Applied Research Services to examine jury selection records. (JC) CTC EOD: 3/13/81 |
| | 20 | JOINT SPECIAL MOTION by Deft to Suppress. |
| | 21 | MEMORANDUM in Support of Motion to Suppress. |
| | 22 | JOINT MOTION by Deft to Dismiss. |
| | 23 | MEMORANDUM in Support of Motion to Dismiss. |
| | 24 | JOINT MOTION by Deft to Disclose Confidential Informants and/or Undercover Govt Agents. |
| | 25 | MEMORANDUM BRIEF in Support of Motion to Disclose. |
| | 26 | JOINT MOTION by Deft for Disclosure, Inspection & Discovery. |
| | 27 | MEMORANDUM BRIEF in Support of Motion for Disclosure. |
| | 28 | JOINT MOTION by Deft for Bill of Particulars. |
| | 29 | MEMORANDUM BRIEF in Support of Motion for Bill of Particulars. |
| | 30 | JOINT MOTION by Deft for Govt Disclosure of Full Extent of Electronic Surveillance and Fourth Amendment Intrusions. |
| | 31 | MEMORANDUM BRIEF in Support of Motion for Govt Disclosure. |
| | 32 | JOINT MOTION by Deft to Suppress Evidence. |
| | 33 | MEMORANDUM in Support of Motion to Suppress. |

| Date | Nr. | Proceedings |
|---|---|---|
| | 34 | JOINT MOTION by Deft for Unsealing and Production of Further Court Documents Re Electronic Surveillance and Fourth Amendment Intrusions. |
| 3/12/81 | 35 | MOTION by Deft for Leave to Fle Additional Motions. |
| 3/12/81 | 40 | MOTION by Deft for Severance. |
| | 41 | MEMORANDUM in Support of Motion for Severance. |
| 3/12/81 | 46 | MOTION by Deft for Severance from Deft Karo. |
| | 47 | MEMORANDUM in Support of Motion for Severance. |
| 3/19/81 | | Motion hearing of 3-23-81 vacated by telephone. |
| 3/19/81 | 49 | RESPONSE by Govt to Defense Motions. |
| 3/25/81 | 51 | SUPERSEDING INDICTMENT. |
| 3/26/81 | | SUMMONS issued for appearance 4/21/81, at 11 before Mag. |
| 3/26/81 | | ARRAIGNMENT. Counsel present but Deft not present. Counsel enter plea of NOT GUILTY for Deft to Superseding Indictment. Present Conds of Rel to remain. New Motions to be filed by 4/10/81. HCB<br>USM advised not to serve summons. |
| 4/2/81 | | Hearing on pending motions Mon., 5-4-81, 9:30 A.M. Notice to parties. |
| 4/2/81 | | Jury trial Mon., 6-1-81, 9:30 A.M. Notice mailed. |
| 4/2/81 | 52 | ORDER that Deft produce any U.S. passport he has by 4/24/81, to Clerk of this Court, which passport(s) shall be sealed by the Clerk and remain in custody of Clerk until |

| Date | Nr. | Proceedings |
|---|---|---|
| | | further order of Court at trial, and that a subpoena duces tecum under Rule 17(c) FRCP be issued and served. (HCB) EOD: 4/2/81 CTC & Deft. One copy to Clerk. |
| 4/9/81 | | Motion hearing changed to 5-11-81. Notice mailed. |
| 5/11/81 | | 9:30 A.M. Called for hearing on pending motions. Deft. present and by Joseph "Sib" Abraham, Jr., and Wm. C. Marchiondo, retained counsel; Govt by Richard J. Smith and Larry Gomez. Evidence presented. 5:10 P.M. Recess to 9:00 A.M. tomorrow. |
| 5/12/81 | | 9:00 A.M. Second day of motion hearing. Appearances as on first day. Court makes ruling in open court. 3:00 P.M. Recess. |
| | | Bratton, J. Rptr: Meier |
| 5/22/81 | 65 | ORDER that all evidence which is the fruit of the installation of an electronic tracking device to follow a quantity of ether pursuant to the Order of 9/10/80 is suppressed as evidence; and included in the above order as fruit of the electronic tracking device is evidence derived from the installation of "entry tone alarms" in storage lockers in Alb., NM and the search of a house in Taos, NM. (HCB) EOD: 5/22/81, CTC. |
| 6/19/81 | 69 | MOTION by Govt to Reconsider and Set Aside Order. |
| 6/29/81 | 70 | JOINT RESPONSE by Defts to Pltf's Motion to Reconsider and Set Aside Order. |
| 7/10/81 | 71 | ORDER that the Motion by govt. to reconsider and set aside the Order of 5/22/81 granting deft. Motion to Suppress Evidence is denied. (HCB) EOD: 7/10/81 CC: CTC, U.S. Atty. |

| Date | Nr. | Proceedings |
|---|---|---|
| 7/10/81 | 72 | MEMORANDUM OPINION (HCB) EOD: 7/10/81 CC: CTC, U.S. Atty. |
| 8/6/81 | 73 | NOTICE OF APPEAL by Plaintiff of the Order of 7/10/81 and 5/22/81. |
| | | Districation on NOA as follows: |
| | | To Deft: Copy of NOA. |
| | | To USCA: Copy of NOA, docket entries w/ cert. of desig attached; transcript order form, desig ltr setting conference for 8/13/81 at 10:00 a.m. USCA form ltr. L-2 L-2(a) (docketing statement instrs). |
| | | To Appellee: Copy of NOA, copy of docket entries w/cert of desig attached, & desig ltr setting conference. |
| | | To Court Reporter: Copy of NOA, docket entries & desig ltr. |
| | | To Judge: Copy of NOA. |
| | | To USM: Copy of NOA. |
| 8/10/81 | 74 | ORDER correcting Order of 7/10/81 and adding name of deft. Gene R. Rhodes to caption of that Order. (HCB) EOD: 8/10/81 CTC, USA, USM, Deft., Probation |

UNITED STATES DISTRICT COURT

No. 81-00021

UNITED STATES

*v.*

MICHAEL GAYLORD STEELE

| | |
|---|---|
| 21:846 | Conspiracy (Ct. I) |
| 21:841(a)(1) | Possession with Intent to Distribute Cocaine (Ct. IV) |
| 18:2 | Aiding and Abetting |
| 21:846 | Conspiracy (Ct. I) |
| 21:841(a)(1) | Possession with Intent to Distribute Cocaine (Ct. IV) |
| 18:2 | Aiding and Abetting |

DOCKET ENTRIES

| Date | Nr. | Proceedings |
|---|---|---|
| | | *MAGISTRATE PAPERS:* |
| 2/10/81 | | COMPLAINT<br>CONDS. OF RELEASE ($15,000 c/s) |
| 2/11/81 | | APPEARANCE BOND ($15,000 surety [Sandoval, Sandoval & Trimble Bonding Co., 401 5th, N.W., Albuquerque]<br>STEELE: 907 McDuffie Cr., N.E. Albuquerque, NM 87110 |
| 2/9/81 | | AFFIDAVIT FOR SEARCH WARRANT & SEARCH WARRANT. |
| 2/11/81 | 1 | INDICTMENT. |

| Date | Nr. | Proceedings |
|---|---|---|
| 2/12/81 | | ARRAIGNMENT. Counsel present. Plea of NG. Trial set 3/30/81, at 9:30 a.m., before HCB. Ten days to file motions. Gallagher |
| 2/19/81 | 5 | ENTRY OF APPEARANCE by Mr. Beam. |
| 2/26/81 | 9 | REQUEST by Deft for Extension of Time to File Motions. |
| 2/26/81 | 10 | MINUTE ORDER that Deft is granted extension of time to 3/12/81, to file motions; further that Govt respond to Defts' motions by 3/19/81; and motions hearing set for 3/23/81, at 9:30 a.m. (JC:krg) CTC |
| 3/5/81 | | Notice of jury trial of 3-30-81 mailed. |
| 3/9/81 | 16 | MOTION by Govt for issuance of subpoena duces tecum in form as attached thereto. |
| 3/10/81 | 17 | MOTION by Deft to Adopt. |
| | 18 | MOTION by Deft for Enlargement of Time re trial. |
| 3/12/81 | 19 | ORDER that Clerk is directed to permit respective counsel, as well as Dr. Blackwell of UNM Institute of Applied Research Services to examine jury selection records. (JC) CTC EOD: 3/13/81 |
| | 20 | JOINT SPECIAL MOTION by Deft to Supress. |
| | 21 | MEMORANDUM in Support of Motion to Suppress. |
| | 22 | JOINT MOTION by Deft to Dismiss. |
| | 23 | MEMORANDUM in Support of Motion to Dismiss. |
| | 24 | JOINT MOTION by Deft to Disclose Confidential Informants and/or Undercover Govt Agents. |

| Date | Nr. | Proceedings |
|---|---|---|
| | 25 | MEMORANDUM BRIEF in Support of Motion to Disclose. |
| | 26 | JOINT MOTION by Deft for Disclosure, Inspection & Discovery. |
| | 27 | MEMORANDUM BRIEF in Support of Motion for Disclosure. |
| | 28 | JOINT MOTION by Deft for Bill of Particulars. |
| | 29 | MEMORANDUM BRIEF in Support of Motion for Bill of Particulars. |
| | 30 | JOINT MOTION by Deft for Govt Disclosure of Full Extent of Electronic Surveillance and Fourth Amendment Intrusions. |
| | 31 | MEMORANDUM BRIEF in Support of Motion for Govt Disclosure. |
| | 32 | JOINT MOTION by Deft to Suppress Evidence. |
| | 33 | MEMORANDUM in Support of Motion to Suppress. |
| | 34 | JOINT MOTION by Deft for Unsealing and Production of Further Court Documents Re Electronic Surveillance and Fourth Amendment Intrusions. |
| 3/12/81 | 35 | MOTION by Deft for Leave to File Additional Motions. |
| 3/12/81 | 42 | MOTION by Deft to Suppress Statements and/or Admissions. |
| | 43 | MOTION by Deft for Severance of Defts and Cts. |
| 3/12/81 | 46 | MOTION by Deft for Severance from Deft Karo. |
| | 47 | MEMORANDUM in Support of Motion for Severance. |

| Date | Nr. | Proceedings |
|---|---|---|
| 3/17/81 | 48 | RESPONSE by Deft In Opposition to Govt's Motion for Issuance of Subpoena Duces Tecum. |
| 3/19/81 | | Motion hearing of 3-23-81 vacated by telephone. |
| 3/19/81 | 49 | RESPONSE by Govt to Defense Motions. |
| 3/25/81 | 51 | SUPERSEDING INDICTMENT. |
| 3/26/81 | | SUMMONS issued for appearance 4/2/81, at 11 before Mag. |
| 3/26/81 | | ARRAIGNMENT. Counsel present but Deft not present. Counsel enter plea of NOT GUILTY for Deft to Superseding Indictment. Present Conds of Rel to remain. New Motions to be filed by 4/10/81. HCB |
| | | USM advised not to serve summons. |
| 4/2/81 | | Hearing on pending motions Mon., 5-4-81, 9:30 A.M. Notice to parties. |
| 4/2/81 | | Jury trial Mon., 6-1-81, 9:30 A.M., Notice mailed. |
| 4/2/81 | | 11:07 A.M. Called for hearing on Govt. motion for issuance of subpoena duces tecum directing delivery of passports to Court. Retained Counsel Jim Beam appears for deft; Govt by AUSA Richard Smith. Defense counsel agrees to submit matter on memoranda on file. Court will order issuance of subpoena and that passports be tendered to the Clerk of the Court and sealed until the further order of the Court. Order to be entered. 11:25 A.M. Recess. |
| | | Bratton, J. Rptr: Meier (Baarstad) |
| 4/21/81 | 52 | ORDER that Deft produce any U.S. passport he has by 4/24/81, to Clerk of this Court, which passport(s) shall be sealed by the |

| Date | Nr. | Proceedings |
|---|---|---|
| | | Clerk and remain in custody of Clerk until further order of Court at trial, and that a subopena duces tecum under Rule 17(c) FRCP be issued and served. (HCB) EOD: 4/2/81 CTC & Deft. One copy to Clerk. |
| 4/9/81 | | Motion hearing changed to 5-11-81. Notice mailed. |
| 4/10/81 | 57 | MOTION by Deft for Specific Disclosure of Exculpatory Info. |
| 4/24/81 | 60 | RESPONSE by Deft to Subpoena Duces Tecum. |
| 5/11/81 | | 9:30 A.M. Called for hearing on pending motions. Deft. present and by Jim Beam, retained counsel; Govt by Richard J. Smith and Larry Gomez. Evidence presented. 5:10 P.M. Recess to 9:00 A.M. tomorrow. |
| 5/13/81 | | 9:00 A.M. Second day of motion hearing. Appearances as on first day. Court makes ruling in open court. 3:00 P.M. Recess. |
| | | Bratton, J. Rptr: Meier |
| 5/22/81 | 65 | ORDER that all evidence which is the fruit of the installation of an electronic tracking device to follow a quantity of ether pursuant to the Order of 9/10/80 is suppressed as evidence; and included in the above order as fruit of the electronic tracking device is evidence derived from the installation of "entry tone alarms" in storage lockers in Alb., NM and the search of a house in Taos, NM. (HCB) EOD: 5/22/81, CTC. |
| 6/19/81 | 69 | MOTION by Govt to Reconsider and Set Aside Order. |
| 6/29/81 | 70 | JOINT RESPONSE by Defts to Pltf's Motion to Reconsider and Set Aside Order. |

| Date | Nr. | Proceedings |
|---|---|---|
| 7/10/81 | 71 | ORDER that the Motion by govt. to reconsider and set aside the Order of 5/22/81 granting deft. Motion to Suppress Evidence is denied. (HCB) EOD: 7/10/81 CC: CTC, U.S. Atty. |
| 7/10/81 | 72 | MEMORANDUM OPINION (HCB) EOD: 7/10/81 CC: CTC, U.S. Atty. |
| 8/6/81 | 73 | NOTICE OF APPEAL by Plaintiff of the Order of 7/10/81, and 5/22/81.<br>Distribution of NOA as follows:<br>To Deft: Copy of NOA.<br>To USCA: Copy of NOA, docket entries & desig. ltr.<br>To Appellant: Copy of NOA, docket entries w/cert. of desig attached; transcript order form, desig ltr setting conference for 8/13/81 at 10:00 a.m. USCA form ltr. No. L-2 & L-2(a) (docketing statement instrs).<br>To Appellee: Copy of NOA, copy of docket entries w/cert of desig attached, & desig ltr setting conference.<br>To Court Reporter: Copy of NOA, docket entries & desig ltr.<br>To Judge: Copy of NOA.<br>To USM: Copy of NOA. |
| 8/10/81 | 74 | ORDER correcting Order of 7/10/81 and adding name of deft. Gene R. Rhodes to caption of that Order. (HCB) EOD: 8/10/81 CTC, USA, USM, Deft., Probation |

UNITED STATES DISTRICT COURT

No. 81-00021

UNITED STATES

*v.*

EVAN ROTH

| | |
|---|---|
| 21:846 | Conspiracy (Ct. I) |
| 21:841(a)(1) | Possession with Intent to Distribute Cocaine (Ct. IV) |
| 18:2 | Aiding and Abetting |
| 21:846 | Conspiracy (Ct. I) |
| 21:841(a)(1) | Possession with Intent to Distribute Cocaine (Ct. IV) |
| 18:2 | Aiding and Abetting |

DOCKET ENTRIES

| Date | Nr. | Proceedings |
|---|---|---|
| | | *MAGISTRATE PAPERS:* |
| 2/10/81 | | COMPLAINT<br>CONDS. OF RELEASE ($15,000 c/s) |
| 2/11/81 | | Motion for Modification of Condition of Release filed by defendant. |
| | | Unopposed by USA |
| | | FIRST AMENDED CONDS. OF RELEASE entered (DRG)—$15,000/10% deposit |
| 2/12/81 | | APPEARANCE BOND. (Receipt attached for $1,500) |
| | | ROTH: 4745 Gibson, S.E., Apt. C<br>Albuquerque, NM 87108 |

| Date | Nr. | Proceedings |
|---|---|---|
| 2/9/81 | | AFFIDAVIT FOR SEARCH WARRANT & SEARCH WARRANT. |
| 2/17/81 | | ORDER Appointing FPD. (McCoy) |
| 6/3/81 | | CJA 21 authorizing payment to Cary J. Morrow, Chemist. |
| 2/11/81 | 1 | INDICTMENT. |
| 2/12/81 | | ARRAIGNMENT set 2/19/81, at 11 before Mag. |
| 2/19/81 | | ARRAIGNMENT. Counsel present. Plea of NG. Trial set 3/30/81, at 9:30 a.m., before HCB. Ten days to file motions. Gallagher |
| 2/26/81 | 10 | MINUTE ORDER that Deft is granted extension of time to 3/12/81, to file motions; further that Govt respond to Defts' motions by 3/19/81; and motions hearing set for 3/23/81, at 9:30 a.m. (JC:krg) CTC |
| 2/26/81 | 11 | MOTION by Deft for Extension of Time to File Motions. |
| 3/5/81 | | Notice of jury trial of 3-30-81 mailed. |
| 3/6/81 | 15 | MOTION by Deft for Order to permit defense counsel as well as Dr. Blackwell examine questionnaires and other jury selection records. |
| 3/9/81 | 16 | MOTION by Govt for issuance of subpoena duces tecum in form as attached thereto. |
| 3/12/81 | 19 | ORDER that Clerk is directed to permit respective counsel, as well as Dr. Blackwell of UNM Institute of Applied Research Services to examine jury selection records. (JC) CTC EOD: 3/13/81 |
| | 20 | JOINT SPECIAL MOTION by Deft to Suppress. |

| Date | Nr. | Proceedings |
|---|---|---|
| | 21 | MEMORANDUM in Support of Motion to Supp ess. |
| | 22 | JOINT MOTION by Deft to Dismiss. |
| | 23 | MEMORANDUM in Support of Motion to Dismiss. |
| | 24 | JOINT MOTION by Deft to Disclose Confidential Informants and/or Undercover Govt Agents. |
| | 25 | MEMORANDUM BRIEF in Support of Motion to Disclose. |
| | 26 | JOINT MOTION by Deft for Disclosure, Inspection & Discovery. |
| | 27 | MEMORANDUM BRIEF in Support of Motion for Disclosure. |
| | 28 | JOINT MOTION by Deft for Bill of Particulars. |
| | 29 | MEMORANDUM BRIEF in Support of Motion for Bill of Particulars. |
| | 30 | JOINT MOTION by Deft for Govt Disclosure of Full Extent of Electronic Surveillance and Fourth Amendment Intrusions. |
| | 31 | MEMORANDUM BRIEF in Support of Motion for Govt Disclosure. |
| | 32 | JOINT MOTION by Deft to Suppress Evidence. |
| | 33 | MEMORANDUM in Support of Motion to Suppress. |
| | 34 | JOINT MOTION by Deft for Unsealing and Production of Further Court Documents Re Electronic Surveillance and Fourth Amendment Intrusions. |
| 3/12/81 | 35 | MOTION by Deft for Leave to File Additional Motions. |

| Date | Nr. | Proceedings |
|---|---|---|
| 3/12/81 | 44 | MOTION by Deft for Severance. |
| | 45 | MEMORANDUM in Support of Motion for Severance. |
| 3/12/81 | 46 | MOTION by Deft for Severance from Deft Karo. |
| | 47 | MEMORANDUM in Support of Motion for Severance. |
| 3/19/81 | | Motion hearing of 3-23-81 vacated by telephone. |
| 3/19/81 | 49 | RESPONSE by Govt to Defense Motions. |
| 3/23/81 | 50 | RESPONSE by Deft in Opposition to Issuance of Subpoena Duces Tecum. |
| 3/25/81 | 51 | SUPERSEDING INDICTMENT. |
| 3/26/81 | | SUMMONS issued for appearance 4/2/81, at 11 before Mag. |
| 3/26/81 | | ARRAIGNMENT. Counsel present but Deft not present. Counsel enter plea of NOT GUILTY for Deft to Superseding Indictment. Present Conds of Rel to remain. New Motions to be filed by 4/10/81. HCB |
| | | USM advised not to serve summons. |
| 4/2/81 | | Hearing on pending motions, Mon., 5-4-81, 9:30 A.M. Notice mailed. |
| 4/2/81 | | Jury trial Mon., 6-1-81, 9:30 A.M. Notice mailed. |
| 4/2/81 | | 11:07 A.M. Called for hearing on Govt. motion for issuance of subpoena duces tecum directing delivery of passports to Court. Ray Twohig for deft Roth had previously stated that Court could rule on the matter on memoranda submitted on issue. Counsel for co-deft Steele present at hearing; Govt by AUSA Richard Smith. Court will order issuance of subpoena and that passports be tendered to the Clerk of the Court and sealed |

| Date | Nr. | Proceedings |
|---|---|---|
| | | until the further order of the Court. Order to be entered. 11:24 A.M. Recess. |
| | | Bratton, J. Rptr: Meier (Baarstad) |
| 4/2/81 | 52 | ORDER that Deft produce any U.S. passport he has by 4/24/81, to Clerk of this Court, which passport(s) shall be sealed by the Clerk and remain in custody of Clerk until further order of Court at trial, and that a subpoena duces tecum under Rule 17(c) FRCP be issued and served. (HCB) EOD: 4/2/81 CTC & Deft. One copy to Clerk. |
| 4/9/81 | | Motion hearing changed to 5-11-81. Notice mailed. |
| 4/8/81 | 53 | ORDER for Free Process. (HCB) EOD: 4/9/81 One CC to USM. *SEALED* |
| | 54 | ORDER Sealing Order for Free Process. (HCB) EOD: 4/9/81 CTC |
| 4/24/81 | 61 | RESPONSE by Deft to Subpoena Duces Tecum. |
| 5/8/81 | 63 | ORDER FOR FREE PROCESS. (HCB) EOD: 5/8/81 One CC to USM. *SEALED* |
| | 64 | ORDER Sealing Order for Free Process. (HCB) EOD: 5/8/81. CTC. |
| 5/11/81 | | 9:30 AM Called for hearing on pending motions. Deft. present and by Raymond Twohig, FPD; Govt by Richard J. Smith and Larry Gomez. Evidence presented. 5:10 PM Recess to 9:00 A.M. tomorrow. |
| 5/12/81 | | 9:00 A.M. Second day of motion hearing. Appearances as on first day. Court makes ruling in open court. 3:00 P.M. Recess. |
| | | Bratton, J. Rptr: Meier |

| Date | Nr. | Proceedings |
|---|---|---|
| 5/22/81 | 65 | ORDER that all evidence which is the fruit of the installation of an electronic tracking device to follow a quantity of ether pursuant to the Order of 9/10/80 is suppressed as evidence; and included in the above order as fruit of the electronic tracking device is evidence derived from the installation of "entry tone alarms" in storage lockers in Alb., NM and the search of a house in Taos, NM. (HCB) EOD: 5/22/81, CTC. |
| 6/19/81 | 69 | MOTION by Govt to Reconsider and Set Aside Order. |
| 6/29/81 | 70 | JOINT RESPONSE by Defts to Pltf's Motion to Reconsider and Set Aside Order. |
| 7/10/81 | 71 | ORDER that the Motion by govt. to reconsider and set aside the Order of 5/22/81 granting deft. Motion to Suppress Evidence is denied. (HCB) EOD: 7/10/81 CC: CTC, U.S. Atty. |
| 7/10/81 | 72 | MEMORANDUM OPINION (HCB) EOD: 7/10/81 CC: CTC, U.S. Atty. |
| 8/6/81 | 73 | NOTICE OF APPEAL by Plaintiff of the Order of 7/10/81, and 5/22/81. |
| | | Distribution of NOA as follows: |
| | | To Deft: Copy of NOA. |
| | | To USCA: Copy of NOA, docket entries & desig ltr. |
| | | To Appellant: Copy of NOA, docket entries w/cert. of desig attached; transcript order form, desig ltr setting conference for 8/13/81 at 10:00 a.m. USCA form ltr. 8/13/81 at 10:00 a.m. USCA form ltr. L-1 & L-2(a) (docketing statement instrs). |
| | | To Appellee: Copy of NOA, copy of docket entries w/cert of desig attached, & desig ltr setting conference. |

| Date | Nr. | Proceedings |
|---|---|---|
| | | To Court Reporter: Copy of NOA, docket entries & desig. ltr.<br>To Judge: Copy of NOA.<br>To USM: Copy of NOA. |
| 8/10/81 | 74 | ORDER correcting Order of 7/10/81 and adding name of deft. Gene R. Rhodes to caption of that Order. (HCB) EOD: 8/10/81 CTC, USA, USM, Deft., Probation |

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

Criminal No. 81-21

21 U.S.C. 846 Conspiracy; 21 U.S.C. 841(a)(1)
Possession With Intent to Distribute Cocaine;
18 U.S.C. 2 Aiding and Abetting

UNITED STATES OF AMERICA, PLAINTIFF

*vs.*

JAMES CONNORS KARO, RICHARD MILES HORTON, WILLIAM ROBERTSON HARLEY, GENE R. RHODES, MICHAEL GAYLORD STEELE and EVAN ROTH, DEFENDANTS

SUPERCEDING INDICTMENT

The Grand Jury charges:

*COUNT I*

That commencing on or about the 1st day of December, 1978, and continuing thereafter through on or about the 10th day of February, 1981, in the State and District of New Mexico, the Defendants JAMES CONNORS KARO, RICHARD MILES HORTON, WILLIAM ROBERTSON HARLEY, GENE R. RHODES, MICHAEL GAYLORD STEELE and EVAN ROTH, unlawfully, wilfully, knowingly, and intentionally did agree, combine, conspire and confederate together with one another and with one or more other persons not named herein as defendants, for the purpose of committing offenses against the United States, to wit: possession with intent to distribute Cocaine, a Schedule II narcotic drug controlled substance, contrary to and in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

In furtherance of their said conspiracy and to effect its object they performed, among others, the following overt acts:

1. On or about the 1st day of January, 1979, in the State and District of New Mexico, the Defendant GENE R. RHODES travelled by auto from Albuquerque, New Mexico to a location near Taos, New Mexico, for the purpose of extracting and purifying Cocaine, a Schedule II narcotic drug controlled substance.

2. On or about the 20th day of September, 1980, in the State and District of New Mexico, the Defendants JAMES CONNORS KARO and RICHARD MILES HORTON obtained and possessed a quantity of anhydrous ether for the purpose of extracting and purifying Cocaine, a Schedule II narcotic drug controlled substance.

3. On or about the 10th day of February, 1981, in the State and District of New Mexico, the Defendants RICHARD MILES HORTON, WILLIAM ROBERTSON HARLEY, MICHAEL GAYLORD STEELE and EVAN ROTH, did possess a quantity of Cocaine, a Schedule II narcotic drug controlled substance, and a quantity of Cocaine, a Schedule II narcotic drug controlled substance, in an anhydrous ether solution.

In violation of 21 U.S.C. 846.

*COUNT II*

On or about the 30th day of September, 1980, in the State and District of New Mexico, the Defendant JAMES CONNORS KARO, unlawfully, knowingly, and intentionally did possess with intent to distribute a quantity of Cocaine, a Schedule II narcotic drug controlled substance.

In violation of 21 U.S.C. 841(a)(1).

*COUNT III*

On or about the 30th day of September, 1980, in the State and District of New Mexico, the Defendant

JAMES CONNORS KARO, unlawfully, knowingly, and inntentionally did distribute a quantity of Cocaine, a Schedule II narcotic drug controlled substance.

In violation of 21 U.S.C. 841(a)(1).

*COUNT IV*

On or about the 10th day of February, 1981, in the State and District of New Mexico, the Defendants RICHARD MILES HORTON, WILLIAM ROBERTSON HARLEY, MICHAEL GAYLORD STEELE and EVAN ROTH, unlawfully, knowingly and intentionally did possess with intent to distribute a quantity of Cocaine, a Schedule II narcotic drug controlled substance.

In violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

A TRUE BILL:

Foreman of the Grand Jury

/s/ R. E. Thompson
R. E. THOMPSON
United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 81-21 Criminal

UNITED STATES OF AMERICA, PLAINTIFF

*vs.*

JAMES CONNORS KARO, ET AL., DEFENDANTS

[Filed Mar. 12, 1981]

## JOINT MOTION TO SUPPRESS EVIDENCE

The Defendants, through their undersigned attorneys, respectfully move the Court to suppress all evidence, tangible or intangible, seized and information gained, directly or indirectly, as a result of unlawful electronic surveillance and Fourth Amendment intrusions.

As grounds, the Defendants state:

1. On September 10, 1980, United States District Judge Edwin L. Mechem, acting pursuant to a request for authorization by the United States ("Exhibit A"), signed an Order ("Exhibit "C") authorizing the installation of an electronic tracking device (beeper) in a five-gallon can of anhydrous ether that had been ordered by Carl Muehlenweg.

2. A beeper was installed in a five-gallon container of ether owned by agents of the Drug Enforcement Administration (DEA) and this container was switched with a similar container ordered by Carl Muehlenweg and allegedly owned by Defendant Karo.

3. According to an affidavit accompanying an application upon which the Order mentioned above was extended for ninety days (Exhibit E), the ether containing the beeper was later located at 1108 Monroe, SE, Albuquerque, New Mexico, the residence of Defendant Karo

and was subsequently located at 1808 Rita, NE, Albuquerque, New Mexico, and 315 Wellsley Place, NE, Albuquerque, New Mexico, private residences of the other Defendants.

4. Tangible and intangible evidence against the Defendants was procurred as a result of the implantation and use of the electronic beeper by agents of the DEA.

5. The use of the beeper inside the Defendants' cars, houses and other property, constituted searches and seizures within the meaning of the Fourth Amendment to the United States Constitution.

6. The Orders authorizing the installation of the beeper were not valid in that there is no statute or court rule authorizing this procedure.

7. If the Orders were intended to be search warrants issued pursuant to Rule 41 of the Federal Rules of Criminal Procedure, they were invalid because they did not comply with the requirements of that rule, including, but not limited to the following:

a. The affidavit supporting the Orders failed to establish probable cause to believe the property to be seized was in the place to be searched;

b. The Orders did not contain requirements that they be served between the hours of 6:00 a.m. and 10:00 p.m., or show reasonable cause to authorize their execution at night;

c. The Orders were not served at the time of the seizure, nor were copies or receipts left at the places where the Orders were executed;

d. There were no returns made nor were written inventories filed;

e. The warrants did not require that they be served within ten days, nor were they served within ten days; and,

f. The Orders were not for the purpose of searching for and seizing designated property;

8. If the Orders were intended to be issued pursuant to 18 U.S.C. 2510-2520, the wiretapping statute, they

were invalid because they did not comply with the requirements of that statute, including, but not limited to the following:

a. The statute only authorizes orders to be issued for eavesdropping or interception of a wire or oral communication, not for an electronic tracking device;

b. The affidavits failed to show facts necessary to establish probable cause that seizable evidence would be obtained by the use of the electronic tracking device;

c. The affidavits failed to comply with the requirements of 18 U.S.C. § 2518(1), which sets out the contents and form of the application for the order, in that they contain no statements of the period of time for the application;

d. The Orders failed to contain statements as to whether the interruption automatically terminated when desired communications had been obtained, as required by 18 U.S.C. § 2518(4)(e);

e. The Orders failed to contain the identity of the person whose communications were to be intercepted, as required by 18 U.S.C. § 2518(4); and,

f. The Orders failed to contain any constitutionally adequate provision for a return to the Court.

9. The issuance of the Orders were not based upon probable cause.

10. The issuance of the Orders granting extension of the authorized use of the beeper were not based upon probable cause.

11. The DEA agents violated the express terms of Judge Mechem's original Order which forbade any trespass on real property when they continued to monitor the beeper after it was located in the private residences of the Defendants.

12. The original Order was limited to thirty days and was subsequently extended to ninety days. The affidavits in support of the Orders and the extensions contain material misrepresentations of fact that were knowingly made. Specifically, *inter alia*, the application stated that

Carl Muehlenweg was an offender when in fact he was acting as a DEA agent (said misstatements are detailed in a special motion to suppress filed contemporaneously with this motion).

13. The installation of the beeper was not in compliance with Judge Mechem's original Order in that the DEA agents installed the beeper in a cannister belonging to the federal government and then transferred the ether from the cannister ordered by Muehlenberg. Judge Mechem's Order authorized the installation of a beeper in a cannister ordered by Muehlenweg.

14. Agents continued surveillance from January 7 to 13, 1981, during which time there was no order authorizing any surveillance whatsoever.

15. The second application for extension of authorization for the beeper was invalid because the Order had expired prior to its renewal (*see* Exhibit "D").

16. Subsequent to gaining authorization for a beeper and utilizing same, the DEA agents secured a Court Order from Judge Mechem (Exhibit N) to enter Locker # 143, U-Stor-It Company, 407 Cutler, Albuquerque, New Mexico, and install a tone alarm which they accomplished on October 9, 1980.

17. The application (Exhibit L) and supporting affidavit (Exhibit M), utilized to secure this Order and the resulting Order were insufficient and invalid for the following reasons:

a. The affidavit did not set forth a factual situation which rises to the level of probable cause to believe that a crime was being committed.

b. The affidavit did not set forth a factual situation which would demonstrate or even allege that ordinary forms of surveillance would not suffice.

c. The affidavit and application did not sufficiently connect the five-gallon drum of ether with a specific offense.

d. The application and affidavit do not conform to the requirements of 18 U.S.C. 2511, *et seq.*, which is the

only statutory scheme allowing entry to implant electronic surveillance devices.

e. This search was the fruit of the prior unlawful electronic surveillance (beeper).

f. The request and resulting Order do not satisfy the requirements of the Fourth Amendment and Rule 41 of the Federal Rules of Criminal Procedure.

g. The request and resulting Order do not conform with the requirements of 18 U.S.C. 2811, *et seq.*

18. The Order to enter and to install the electronic equipment is invalid because:

a. The absence of a time limit for such installation voids such an order;

b. There is no precedent in common law for the utilization of a search warrant for this purpose; and,

c. There is no statutory scheme which would permit such entry upon the justification and authorization offered.

19. An order so framed is in violation of the guarantees of the Fourth Amendment to the United States Constitution.

20. The affidavit contained material misrepresentations of fact that were knowingly made. Specifically, the affidavit refers to an attachment, Exhibit A, but there is no Exhibit A attached to the affidavit in the Court file. (*See* Special Motion to Suppress filed on this date).

21. Subsequent to gaining authorization for a beeper and the entry into the storage locker, the agents of the DEA sought a search warrant for "a two-story contemporary wood frame house . . . located about 2.7 miles northwest on New Mexico Route 240, from the intersection of Routes 240 and 68 at Taos, New Mexico."

22. The application and supporting affidavit, as well as the resulting Order (Exhibits J & K), were invalid for the following reasons:

a. This search was the fruit of the prior unlawful electronic surveillance (beeper); and also the fruit of the prior unlawful entry into storage locker # 143;

b. The affidavit did not set forth a factual situation which rises to the level of probable cause to believe that a crime was being committed; and

c. The affidavit supporting such search warrant contains several misstatements of fact which were intentionally or recklessly made by the government agent making the affidavit (said misstatements are detailed in the Special Motion to Suppress filed on this date).

WHEREFORE, the Defendants respectfully request that this Court suppress all tangible items, sensory information, testimony and other fruits of the unlawful electronic surveillance and Fourth Amendment intrusions described above.

Respectfully submitted,

FREEDMAN, BOYD & DANIELS, P.A.

By /s/ Nancy Hollander
NANCY HOLLANDER
40 First Plaza, 7th Floor
Albuquerque, New Mexico 87102
(505) 842-9960
Attorneys for Defendant Karo

/s/ [Illegible]
JOSEPH (SIB) ABRAHAM, JR.
CHARLES LOUIS ROBERTS
505 Caples Building
El Paso, Texas 79901
Attorneys for Defendant William Robertson Harley

/s/ R. Raymond Twohig
RAYMOND TWOHIG
Assistant Public Defender
United States Courthouse
Albuquerque, New Mexico 87102
Attorney for Defendant Evan Roth

/s/ William C. Marchiondo
WILLIAM C. MARCHIONDO
P.O. Box 568
Albuquerque, New Mexico 87102
Attorney for Defendant Richard
Miles Horton

/s/ J. R. Beam
715 Tijeras, NW
Albuquerque, New Mexico 87103
Attorney for Defendant Michael
Gaylord Steele.

I hereby certify that the foregoing
Motion was hand-delivered to the
U.S. Attorney's Office this 12th
day of March, 1981.

/s/ [Illegible]

EXHIBIT A

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

No. N9478

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING THE INSTALLATION OF AN ELECTRONIC TRACKING BEACON ("BEEPER") IN ONE FIVE-GALLON CAN CONTAINING ANHYDROUS ETHER

[Filed Sep. 10, 1980]

APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING THE USE OF AN ELECTRONIC "BEEPER" AS A SURVEILLANCE AID

James F. Blackmer, Assistant United States Attorney, having reviewed the attached Affidavit of Special Agent Richard Rottinger, hereby respectfully requests an Order authorizing the use of an electronic tracking beacon ("beeper") in one five-gallon can containing Anhydrous Ether for thirty (30) days (or October 15, 1980, whichever shall first occur) in the investigation of offenses committed by Carl Muehlenweg and others in violation of 21 USC 841(a)(1) and 846, manufacturing a controlled substance and conspiracy to manufacture a controlled substance.

This application is based on the sworn Affidavit of Special Agent Richard Rottinger, Drug Enforcement Administration, Department of Justice.

R. E. THOMPSON
United States Attorney

/s/ James F. Blackmer
JAMES F. BLACKMER
Assistant U.S. Attorney

EXHIBIT B

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

No. ———

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING THE INSTALLATION OF AN ELECTRONIC TRACKING BEACON ("BEEPER") IN ONE FIVE-GALLON CAN CONTAINING ANHYDROUS ETHER

AFFIDAVIT IN SUPPORT OF AN APPLICATION FOR USE OF AN ELECTRONIC TRACKING BEACON ("BEEPER") AS A SURVEILLANCE AID

Richard Rottinger, Special Agent, Drug Enforcement Administration, United States Department of Justice, presently assigned to the Albuquerque District Office and District of New Mexico being first duly sworn, states that there is probable cause to believe that Carl Muehlenweg and other confederates are committing offenses defined in Title 21 U.S.C. 841(a)(1) and 846, Manufacture of Controlled Substance and Conspiracy to Manufacture a Controlled Substance.

Affiant states that on March 3, 1980, Drug Enforcement Administration Agents of the Albuquerque District Office executed a Federal Search Warrant at Locker Number 170 at the AZTEC SELF-STORAGE FACILITY, 3201 Aztec, N.E., Albuquerque, New Mexico. Seized pursuant to the Search Warrant was a Methamphetamine Laboratory consisting of laboratory glassware, laboratory apparatus and precursor chemicals having application in the synthesis of Methamphetamine and Phenylacetone, both Schedule II Controlled Substances. Also seized pursuant to the Search Warrant were the original shipping containers for the laboratory glassware, laboratory apparatus and precursor chemicals bearing purchase order

and shipping invoice numbers indicating the purchase of the above were effected by Carl Muehlenweg, representing GRAPHIC PHOTO DESIGN, 619 Jefferson, Albuquerque, New Mexico.

Affiant states that on April 25, 1980, Drug Enforcement Administration Agents of the Albuquerque District Office executed a Federal Search Warrant at 619 Jefferson, Albuquerque, New Mexico. Seized pursuant to the Search Warrant were purchase orders from GRAPHIC PHOTO DESIGN, invoices and monthly statements from laboratory glassware, laboratory apparatus and chemical suppliers that were consistent with the seizure of laboratory glassware, laboratory apparatus and chemicals seized March 3, 1980. Drug Enforcement Agency laboratory analysis of the laboratory equipment showed amphetamine residue (and more such residue at 619 Jefferson N.E., Albuquerque, New Mexico, the residence of Carl Muehlenweg).

Affiant has verified with Mike Ronsiek, Sales Representative, VWR Scientific Inc. on September 3, 1980, that Graphic Photo Design, 619 Jefferson, N.E., Albuquerque, New Mexico has ordered ten (10) five-gallon cans of Anhydrous Ether. This ether was prepaid by Muehlenweg representing Graphic Photo Design. Such ether (advises Ronsiek) will be shipped to Graphic Photo Design in early September, 1980.

Affiant requests to install the foregoing physical surveillance aid in a five-gallon ether can in order to enable the Drug Enforcement Agency to follow the above items to their ultimate destination (and person(s) using them to illegally manufacture controlled substances in violation of 21 USC 841(a)(1) and 846.

/s/ Richard Rottinger
RICHARD ROTTINGER
Special Agent
Drug Enforcement Administration

Subscribed and sworn to before me this the 12th day of September, 1980.

/s/ [Illegible]
United States District Judge

EXHIBIT J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Docket No. 81-1129

UNITED STATES OF AMERICA

*vs.*

A TWO-STORY CONTEMPORARY WOOD FRAME HOUSE NORTH OF RANCHOS DE TAOS (AND SOUTH OF TAOS) NEW MEXICO (SEE BELOW FOR FURTHER DESCRIPTION)

SEARCH WARRANT

To Any Special Agent of the United States Drug Enforcement Administration

Affidavit(s) having been made before me by Special Agent Richard Rottinger, United States Drug Enforcement Administration that he has reason to believe that on the premises known as A Two-story wood frame house, north of Ranchos de Taos (and South of Taos), New Mexico. This residence faces north, has a deck on the second floor facing south, and a "stockade" fence along the road paralled to the front of the house. There is a sign or tag at the entrance to the driveway with the words "Meadowwind", burnt into a piece of wood on the stockade fence. This residence is located about 2.7 miles northwest on New Mexico Route 240, from the intersection of Routes 240 and 68 at Taos, New Mexico. There is a telephone pole in front of the stockade fence at this residence, and this telephone pole bears the numbers "83", "20", and "68" on tags on the pole (tags are aligned vertically on the pole). The above premises are known at sight and location to affiant, who will personally participate execution of the Search Warrant District of New Mexico there is now being concealed certain prop-

erty, namely chemicals, equipment and documents which are contraband, instrumentalities and evidence of the manufacture of controlled substances in violation of Title 21 U.S.C. 841(a)(1) and 846 and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

*You are hereby commanded* to search within a period of Ten (10) days (not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search at any time in the day or night * and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before ———————— as required by law.

Dated this 9 day of Feb. 1981

/s/ [Illegible]
*Judge (Federal or State Court of Record) or Federal Magistrate*

## RETURN

I received the attached search warrant February 9, 1981, and have executed it as follows:

On February 10, 1981 at 12:10 o'clock A.M., I searched the person or premises described in the warrant and

I left a copy of the warrant with Michael Gaylord Steele together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

Cocaine Hydrochloride
Marijuana
Laboratory Chemicals and Apparatus
Documents
Revolvers: 1. Colt .22 Serial No. 119855
2. Ruger .357 Serial No. 152-10692.

This inventory was made in the presence of Robert Hastings and Samuel Herrera.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ Richard Rottinger

Subscribed and sworn to and returned before me this day of Feb. 10, 1981.

/s/ [Illegible]
*Federal Magistrate*

EXHIBIT K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

---

Docket No. 81-1129-M

UNITED STATES OF AMERICA

*vs.*

RICHARD HORTON, et al.

AFFIDAVIT FOR SEARCH WARRANT

BEFORE ROBERT W. MCCOY, United States Magistrate, 10th Floor, US District Courthouse, 500 Gold, S.W., Albuquerque, NM, 87102

The undersigned being duly sworn deposes and says:

That he has reason to believe that (on the person of) RICHARD HORTON and adult occupants of below described premises;

A two-story contemporary wood frame house, north of Rachos de Taos (and south of Taos), New Mexico. This residence faces north, has a deck on the second floor facing south, and a "stockade" fence along the road parallel to the front of the house. There is a sign or tag at the entrance to the driveway with the words "Meadowwind", burnt into a piece of wood on the stockade fence. This residence is located about 2.7 miles northwest on New Mexico Route 240, from the intersection of Routes 240 and 68 at Taos, New Mexico. There is a telephone pole in front of the stockade fence at this residence, and this telephone pole bears the numbers "83" "20", and "68" on tags on the pole (tags are aligned vertically on the pole). The above premises are known at sight and

location to affiant, who will personally participate in execution of the search warrant. Also to be searched are outbuildings at said premises.

Also to be searched are each of the vehicles on the curtilage of the above-described premises at the time of the execution of the search warrant, and all closets, cabinets, rooms, storage rooms, luggage, trunks, containers, cubbards, and other places or items in above residence (and on curtilage thereof) hiding or capable of hiding above-described controlled substances and above-described evidence thereof. Specifically to be searched (whether or not any or all said vehicles are at above premises to be searchcd at time of execution of the search warrant) are the following vehicles:

(1.) RICHARD HORTON's vehicle, 1978 Ford pickup truck, red and white in color, bearing New Mexico license CH-0544 thereon; (2.) A white/red Chevorlet Nova automobile, New Mexico Registration (license plate) BFK-712 thereon; (3.) A 1968 Ford car, light blue in color, New Mexico license plate thereon DLG-193.

Also to be searched is Storage Locker Number 15 at the "U-Stor-It" mini-warehouses, 2640 Baylor Drive, S.E., Albuquerque, New Mexico 87106.

Above premises is located in the State and the District of New Mexico, and there is now being concealed certain property, namely

COCAINE in unknown quantities (packaged, drying, in powder, as well as in liquid or other form); Amphetamine in unknown quantities; any other controlled substances possessed or manufactured contrary to law, in which ether is used as a drying agent or solvent or otherwise used in the manufacture, synthesis, extraction, or purification or drying of said controlled substances; Anhydrous ether, in various quantities; glassware, laboratory chemicals and equipment used or designed for use in extracting, drying, purifying, "free-basing", testing, weighing, dilution, packaging, or other unlawful possession, manufacturing or distribution of Cocaine, am-

phetamines or other illegal controlled substances; WRITINGS and RECORDS showing 'formulae, procedures or methods of extraction or purification of controlled substances (cocaine and amphetamines, especially), customers and sources of said drugs. This evidence constitutes evidence of felony violations of United States Law, 21 U.S.C. 341(a)(1) [manufacturing, possession with intent to distribute and/or distribution of controlled substances] and 21 U.S.C 846 (Conspriracy to commit aforesaid crimes).

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: I am a full-time, salaried narcotics law enforcement officer of the US Drug Enforcement Administration, working in New Mexico. I have been a DEA agent for about 10 years, and I have undergone DEA academy training (DEA basic school, 10 weeks; DEA clandestine laboratory and illicit synthesis schools), and worked with DEA chemists and received other training on illegal laboratories and illicit synthesis, extraction, or manufacture of controlled substances (especially Schedule II controlled substances). I have personally investigated and participated in seizures of numerous illegal drug-manufacturing laboratories in New Mexico, and I specialize in investigation, detection, seizure, and prosecution of illegal drug manufacturing or synthesis activities. From such schools, chemists, training, and experience, I am very familiar with the laboratory chemicals and equipment used or commonly used by persons illegally manufacturing or synthesizing, drying, purifying, extracting, or otherwise producing illegal controlled substances. Additionally, from my training, and personal experience as a DEA investigator, and working and talking with fellow narcotics agents and with self-admitted manufacturers, users, and dealers of illegal drugs (especially amphetamines, but also cocaine dealers), I am very familiar with amphetamines and amphetamine labs, and cocaine, and the chemicals and methods used to dry and purify and extract such drugs and the laboratory setups, formulae, and equipment

used to illegally manufacture amphetamines or extract or purify "free-base" cocaine.

In early September 1980, I was advised by a Mike Ronsiek, a self-described sales representative of VWR Scientif, Inc. that approximately 50 gallons of anhydrous ether in 5-gallon cans (i.e., 10 cans of anhydrous ether) had been ordered shortly before then by "Graphic Photo Design" in Albuquerque, New Mexico from VWR Scientific, and that VWR Scientific was shipping this 50 gallons of anhydrous ether in ten 5-gallon cans to Graphic Photo Design in Albuquerque in early September 1980.

Previously, I had participated in an investigation of Graphic Photo Design in Albuquerque, and learned from personal investigation and execution of search warrants and seizures of documents and other items that Graphic Photo Design had (in 1979-1980 period) participated in illegal manufacturing of amphetamines by ordering chemicals and laboratory equipment for persons engaged in illegal amphetamine labs. Indeed, in March, 1980, I participated in a search warrant execution of a storage locker of a Richard Logan, and we found and seized large quantities of laboratory equipment and glassware in the storage locker, and DEA chemical analysis of the residue in such equipment showed residue of amphetamine in the equipment. Also, some of the boxes or packages of equipment with such residue, in the Logan storage locker, had an address of Graphic Photo Design on them. Logan later shot and killed himself in May 1980. However, Graphic Photo Design still exists. Hence, when the above September 1980 telephone conversation between myself and Mike Ronsiek occurred about shipment of a very large quantity of anhydrous ether to Graphic Photo Design, I was very interested. In my extensive training and experience, ether is very commonly used in the manufacturing process of illegal amphetamines (most commonly to extract or dry the illegal amphetamine end product), and also it is commonly used to extract or purify or even "free-base" cocaine. I have not heard of

or learned of any photo studio in New Mexico (or elsewhere) that buys and uses highly flammable, expensive ether in these quantities of 50 gallons.

I participated in monitoring the Albuquerque area trucking terminal that VWR Scientific personel said would deliver or receive the ether. In mid-September 1980, I personally observed 10 cans labelled "Anhydrous ether" from VWR Scientific, at a common carrier premises in Albuquerque. Meanwhile, I had previously ordered a 5-gallon cannister with a "beeper" (a direction-finding transmitter that transmits a "beep" tone and enables direction-finding equipment to locate its position); I planned to use this can—pursuant to Court order—to transfer 5 gallons of ether from its original cannister into this "beeper" cannister, and then surveil the delivery (or customer pickup) of the ether. I obtained a Court Order from US District Judge Edwin L. Meachem on 10 September 1980, authorizing DEA and myself to utilize such a "beeper" cannister, transfer 5 gallons of ether from the 50-gallon shipment into the can, and then monitor the beeper and surveil the "beeper" can (and the other nine 5-gallon cans of ether). Myself and authorized DEA investigators accomplished this prior to any delivery of the ether by the common carrier.

After installation of the ether into the "beeper" can (and leaving intact the other 45 gallons in their nine cannisters), we maintained surveillance on the cans. The cans were initially delivered to Graphic Photo Design. We continued surveillance. On 19 September 1980, Kerry ALLEN picked up the 10 cans of ether and drove them to RICHARD HORTON's residence at 315 Wellesley, N.E.—no one was apparently home—and returned them in the same vehicle back to Graphic Photo Design, with the cans still in the vehicle that Allen drove to and from the Horton residence (we could see the cans in the vehicle before Allen drove off in the vehicle, and then after his return of the vehicle and the cans therein). On 20 September 1980, we could still see the cans in the vehicle

in the street in front of the Graphic Photo Design premises (actually an apparent private residence), and about 10:10 a.m., JAMES CONNORS KARO arrived under our surveillance, retrieved the vehicle containing the 10 cans of ether, and drove them to 1108 Monroe, S.E., Albuquerque. After about an hour, we observed the vehicle (in which the cans were located 19-20 September 1980 in the public street) as it returned to the vicinity of Graphic Photo Design, and we no longer saw the cans of ether in the vehicle. Additionally, using a "beeper" locator (direction finder) we determined that at least the can with 5 gallons of ether in the beeper can was located at 1108 Monroe, S.E., Albuquerque. Later that same evening, again using the beeper locator, we determined that the ether can with the "beeper" in it was now at or in the immediate vicinity of 315 Wellesley, N.E. I walked on the public sidewalk in front of the residence and detected a pronounced and very recognizable odor of ether in the immediate vicinity of (if not actually emanating from) 315 Wellesley, S.E. I have smelled ether on numerous prior occasions, and identified the odor of ether easily emanating from or the immediate vicinity of 315 Wellesley, N.E.

The ether odor continued on 21 September 1980, but within 2 days, the ether (and its odor) no longer smelled as if it were at the Wellesley address. Using the "beeper" locator again, we located the "beeper" can at or in the immediate vicinity of 1803 Rita, N.E., Albuquerque. Later that next evening (23 September 1980) the "beeper" locator shows that the "beeper" can of ether is now located at the U-Stor-It premises at 4701 Cutler, N.E. (I did not determine what specific storage locker, if any, the ether-bearing "beeper" can was in).

On 24 September 1980, pursuant to subpoena on the U-Stor-It company, I learned that "RICHARD HORTON, 1808 Rita Drive" in Albuquerque executed a lease agreement on one of the storage lockers (# 143) in 1979 and still apparently had it leased in his name. The lease

agreement—which I saw—showed Richard Horton gave his address as 1808 Rita, N.E., Albuquerque. Using the "beeper" locator, I narrowed down the area where the "beep" signal was emanating as a row in which locker # 143 was. I walked along the common driveway in front of #143 and smelled again the definite and distinctive odor of ether emanating from # 143. I did not enter or search said locker to get that odor; I could smell it from the common public or semi-public driveway/access road that runs past # 143 and the other lockers in that row).

In October 1980, I obtained a Court Order from US District Judge Meachem authorizing installation and use of an entry tone alarm on locker # 143, which alarm (installed pursuant to that court order on 9 October 1980) would notify us whenever anyone opened the door to said locker #143. Meanwhile, on 8 October 1980, the manager of the U-Stor-It advised me, the manager attempted to contact Richard Horton because Horton was then delinquent on payment/rental fee on # 143, and the manager learned from phoning 1808 Rita, N.E., that Richard Horton was now at another phone number, which the manager provided me. Mountain Bell records show that telephone number to be the telephone located at 315 Wellesley, N.E. The manager advised he contacted a woman at that new number (i.e., at 315 Wellesley, N.E.), who told the manager Horton would soon be at the U-Stor-It to pay the weeks (or months) of delinquent rent payments to the locker].

About 16 October 1980, according to the manager, Horton, in a red and white Ford pickup, retrieved all the contents out of locker #143, before we DEA agents could get to the scene (the entry tone alarm either did not work or malfunctioned; it did not alert us to the opening of the door; only the manager's call to us did).

On 19 October 1980, using the "beeper" locator device (and all still pursuant to Judge Meachem's order authorizing installation and use of the beeper can and a device to locate it), I now located the "beeper" can of ether (i.e.,

the beeper signal itself) emanating at the U-Stor-It, 2640 Baylor Drive, S.E., Albuquerque. The "beeper" did not locate the specific locker in which the "beeper" can was now hidden or concealed. On 20 October 1980, I served a subpoena on this U-Stor-It manager, and pursuant to that subpoena, obtained or observed a lease agreement showing that Locker # 15 at that U-Stor-It was registered to or leased in the name of "Peter ANLIAN", and I previously had detected the odor of ether emanating from locker # 15 by walking along the public access roadway/path along the lockers (even before I served the subpoena on the U-Stor-It manager or saw the U-Stor-It company's lease record for locker # 15). The manager of the U-Stor-It advised me that on 16 October 1980 (same day as above locker # 143 was vacated, 2 persons in a red/white pickup appeared to this present manager, paid $120 cash to cover rental of locker # 15 for the period October 1980-May 1981.

We maintained surveillance at that facility for the next several weeks, and Judge Meachem extended the period for continued use and monitoring of the "beeper" in the can of ether, still emanating from locker #15. On 6 February 1981, we observed (on a videotape from a camera located elsewhere in the area, but not at or in locker # 15 or its curtilage) Richard HORTON and a female apparently unload and bringing out numerous 5-gallon cans into the rear bed of a pickup truck. These 2 persons were obtaining these cans from inside locker # 15 and taking them to the pickup truck and loading them onto the truck. Now, using the "beeper" locator (still pursuant to Judge Meachem's order) we picked up a "beeper" signal in the area of 315 Wellesley, N.E. (i.e., Horton residence), but not, apparently, emanating from within that particular residence. Several minutes later, my fellow DEA agent observed Horton driving the above-described red/white 1978 Ford Pickup truck (License number CH-0544, described above to be searched), and the vehicle parked at 617 Madison, N.E. The "beeper"

locator showed that the can with its implanted "beeper" was now located at the vicinity of 617 Madison, N.E. (we could not tell if the "beeper" can was inside the house at the time, but soon we determined that the "beeper" can was in the pickup. See below). Physically surveilling the area, we observed HORTON and a female bringing boxes and other items from inside the house and loading these items into the trunk of a light blue Ford automobile (bearing license number DLG-193, described above to be searched). No cannisters or 5-gallon cans, that we could see, came from the house into the vehicle. Then, BOTH the pickup truck (followed by above blue Ford) left the area, and DEA physical surveillance followed both vehicles as they travelled along public highways from Albuquerque to Taos; in the surveillance, I used the "beeper" locator (direction finder) and verified that the "beeper" can was in fact in one of the above vehicles, all the way to Taos. This was on 6 February 1981, still.

At Taos, both vehicles stopped on the public highway across from a restaurant/lodge (instead of going into the lodge parking area), and both drivers entered the lodge area. Within a few minutes, another caucasian male accompanied HORTON and the female to the pickup and light car; he entered one of these vehicles, and both vehicles went (under DEA physical observation and surveillance) to the above-described premises to be searched (the house between Ranchos de Taos, and Taos itself), all in the State of New Mexico. When these 2 vehicles arrived at the premises, the occupants went into the above-described premises. For fear of detection, we did not maintain tight surveillance of the residence. However, after awhile (still 6 February 1981), the above pickup, the above light blue car, and another vehicle (a 1974 Chevy Nova, white/red BFK-712, described above to be searched) all left the above premises and returned to the lodge area in Taos. Using the "beeper" locator, I positively determined that the "beeper" can (5-gallon can of ether, described earlier in this affidavit) was now inside

the above-described premises to be searched because the "beeper" locator (direction finder) pinpointed the beeper signal as emanating from the above-described premises. Then, 2 of the vehicles returned to the above premises and stayed there, and the lights in above residence stayed on until at least 1:00 a.m. (now Saturday, 7 February 1981), according to DEA surveillance in the area. Again, later on Saturday (now in the daytime), 7 February 1981, my "beeper" locator still shows a strong "beeper" signal emanating from inside the above-described residence. We continued physical surveillance of above premises via public roads and section roads and other public areas outside the curtilage of above premises. We observed the light blue car and the above pickup on the curtilage of the residence.

We DEA agents personally observed (from areas well outside the curtilage of above premises, in public areas or roads) that the windows and doors of the second floor (at least) of above premises were open to the outside. This was a COLD, WINDY DAY, with wind blowing, temperature near freezing, and otherwise wholly inappropriate for doors and windows to be open to this high, cold area of New Mexico—unless the gallons of ether were being stored and utilized inside the premises and the windows and doors being opened to ensure good ventilation of the premises to prevent hazard to the occupants and/or explosion from any sparks or flames.

The afternoon of 7 February 1981, the above pickup and car left the above premises and returned to the lodge and parked near the above white/maroon 1974 Chevy (BFK-712) (the pickup parked near the Chevy; the blue car made circling and evasive maneuvers as if looking for surveillance, then continued north. To avoid detection, we ceased surveilling it).

Within the past 7 days, I talked with a reliable, confidential informant. I consider the informant reliable and credible because the informant has provided me in the 1980-1981 period with large amounts of information

regarding illicit drug dealing and illicit drug manufacturing, and I have personally verified some of that information (finding it all to be true). The informant is not under arrest, indictment or in jail, nor is the informant seeking or receiving from me any money for below information—or prior information. The informant has made declarations against penal interest in the 1980-1981 period (such as admitting acquiring drugs from one of the above-named suspects under surveillance, within the past 4 months—high-quality cocaine). The informant has no known record of convictions, much less felony convictions. I greatly trust the informant, and have never known or found the informant's large amount of information about drug crimes and drug felonies to be a lie or incorrect. Informant once (within past 4 months) turned over a quantity of cocaine that it (informant) said it acquired from one of the above suspects, and we found the cocaine to be high quality cocaine—as represented by the CI and CI's source(s) above.

The CI advised me that within the past 6 months on various occasions, the CI has personally heard at least two of the persons named above in this Affidavit discussing use of ether to extract COCAINE from fabric (apparently clothing, but at least some type of cloth). According to these persons named above, in conversations within informant's hearing within the past 6 months, HORTON and his confederates get Cocaine in quantities dissolved or hidden in clothing or similar fabric, and they then use quantities of ether to dissolve or extract the cocaine from the clothing or fabric, then evaporate the ether to obtain the pure cocaine from the fabric. CI also advises that it (CI) personally heard at least two of Horton's associates admit within the past 6 months that they have obtained a large quantity of ether and were planning to store it for later use in extracting Cocaine from clothing or fabric. Also, advised the CI, at least one or more of Horton's associates (or Horton himself) stated in CI's hearing within the past 6 months that there is a

house in the Taos area used by one or more of these cocaine/drug associates named above—but CI could not tell me exactly where this residence was. These admissions to CI by above-named associates in the past 6 months have been independently corroborated by my observations, surveillance, "bleeper" use, and physical surveillance by myself and fellow DEA agents as described above.

We checked the registration of the above 1974 Chevrolet Nova, 6-7 February 1981, and according to DMV records, that license on the Nova is registered to Robert N. Steele of Albuquerque. In 1977, according to information to me from my fellow DEA agent involved in the case, Steele is specifically named in a cocaine case wherein a quantity of cocaine was found and seized at an Albuquerque residence by search warrant.

In my extensive experience, the above ether is now in the process of being used in the above-described premises. Th above house to be searched is a private dwelling—a house, not a business or hospital or other place that would ordinarily use ether in any legitimate activity. Ether is very commonly used to dry amphetamine, and also used to dissolve, purify, and "free-base" cocaine by dissolving the cocaine in it and evaporating the ether away and leaving only high-quality cocaine. Indeed, I do not know of any common usage of ether by private citizens (none of above-named persons are nurses or doctors or legitimate lab personnel to my knowledge, investigation, and surveillance), EXCEPT in illegal manufacturing, synthesis, drying, or purification of illegal drugs (primarily amphetamine and cocaine). In my knowledge and investigation of the above group, these persons have engaged in the past in at least illegal dealing of controlled substances, and now make admissions showing their knowledge and intent to import cocaine into New Mexico in clothing or cloth, and use ether to extract it from the clothing, evaporate the ether, and retrieve the cocaine. It should be noted that in our surveillance of the above

Madison avenue address—6 February 1981—just before the above pickup and car left Albuquerque for Taos, we saw the girl and Horton removing boxes from the house and quantities of clothing, which they put into the above light blue car. They did not take any skis with them that I could see, and thus the purpose of this mid-winter, 150 mile trip was not skiing or recreation such as mountain climbing, skiing, etc. (additionally, although the weather in Taos is cold, there is little snow there this year for skiing). And now, on 7 February 1981, the windows (including at least a large window) and door on at least the upper (second) floor of above residence were open wide—despite cold air and winds blowing around the residence and almost certainly reducing the temperature inside above house to near freezing (like the cold wind in the area). Hence, the ether is being opened and used—and not simply stored—in such amounts that they need to ventilate a 2-story house even by near-freezing air to avoid being overcome by ether and/or minimizing chances of explosion. If they were not using the ether inside the house, they would and could easily store it outside (even in a small shed on the curtilage of above premises away from the main building) where the odor would not get into the house, much less require extensive ventilation of the house by opening door(s) and windows on at least the second floor in near-freezing wind.

Therefore, it is likely that the occupants of above house (and occupants of above vehicles) are engaged in the process of manufacturing, synthesizing, extracting, purifying, or at least drying controlled substances inside above premises. We wish to execute this warrant as soon as the process appears complete—which may be at night—to maximize detection and seizure of the drugs, and maximize our abilities to tie all the relevant personnel to this drug synthesis/extraction by enabling continued sur-

veillance of the residence and the persons involved with the ether activities therein.

/s/ Richard Rottinger
RICHARD ROTTINGER
US Drug Enforcement
Administration

/s/ [Illegible]
United States Magistrate
District of New Mexico

SUBSCRIBED AND SWORN TO BEFORE ME THIS 9th DAY OF FEBRUARY, 1981.

/s/ Richard Rottinger
RICHARD ROTTINGER
US Drug Enforcement
Administration

Sworn to before me, and subscribed in my presence,

/s/ [Illegible]
Judge or Federal Magistrate

[DIRECT EXAMINATION OF DEA AGENT RICHARD ROTTINGER BY RESPONDENT HORTON]

[11] Q Can you tell the Court what time it was that you first entered the home or the residence in Taos, New Mexico?

A It was a few minutes after midnight. Actually the morning hours of February the 10th.

Q Twelve, what would that be?

A Approximately fifteen.

Q 12:15?

A Yes, sir.

Q How many people were in the house when you arrived?

A There were four individuals in the residence that were subsequently arrested.

Q How many agents were involved in coming into the premises?

A Several agents from our office assisted by the Taos Police Department and two uniformed officers from the local detachment of the State Police.

Q Did you make—When you say "several agents," how many agents, Mr. Rottinger?

A I would have to look at my 6. But there must have been at least five or six agents from our office.

Q And then other law enforcement officers?

A It would have been the Taos Police Department represented along with the New Mexico State Police.

• • • •

[15] Q Now, where did he make these statements that you claim in this document that you have before you?

A Mr. Horton accompanied myself and Chemist Skinner to that second story bedroom area, and also the balcony that was off the bedroom area where the cocaine —Where a quantity of ether was seen.

The statements of the admission were made to myself and the chemist on the second level of that residence.

Q When you say he accompanied you, did you ask him to go with you?

A Yes, I did.

Q Is there any particular reason why you singled him out of the—strike that.

Did you ask any of the other persons who were arrested to go with you, before you asked Mr. Horton?

A Before I asked Horton, no.

Q Did you ask—All right. Is there any reason why you singled him out to have him accompany you upstairs and to talk to?

A Mr. Horton was one of the subjects of this investigation I had worked.

Q Well, the other persons in the house were not subject of the investigation?

A No. I said he was one of the persons that I had worked.

* * * *

[28] A I don't recall it being that way.

Q Are you suggesting to the Court that he stated to you that he was a participant in the chemical reduction of cocaine from other chemicals, that he led you to believe that by stating that he knew what he was talking about?

A He did not impress me as being a chemist. He did state that he was there to do the final process. I don't know whether that would be considered a reaction or otherwise. But it would have been to precipitate or to come up with a cocaine hydrochloride.

Q You signed an affidavit for a warrant arrest, did you not?

A Several warrants, yes, sir.

Q In this case, I am talking about.

MR. TWOHIG: Your Honor, I think we can avoid having several tests of these affidavits in evidence by just agreeing to one, which is what we are attempting to do now.

THE COURT: All right. I would be all in favor of that.

Q While they're doing that, Mr. Rottinger, is that how you pronounce your name?

A Rottinger.

Q Rottinger. Where it says that Horton further stated he [29] had assisted Steele in the rental of the rural residence, did he describe how he assisted?

A I believe he mentioned that the rental of the home might have been—Michael Steele mentioned it was $400 or $450 a month, and he had assisted in making that monthly payment.

Q $400 to $450 a month?

Q Whatever the dollar amount might have been. He assisted, I believe he said he assisted Steele in the rental.

MR. MARCHIONDO: Your Honor, I notice it is 12:30. This witness will be rather lengthy. I don't know what the Court's plans were. I am just trying to find a document to get over this particular aspect of the examination.

THE COURT: Do you want the Complaint?

MR. MARCHIONDO: Yes, I do. May I approach the bench?

THE COURT: Sure.

MR. MARCHIONDO: Thank you, sir.

Q Showing you the Complaint that was filed before the Magistrate Court, I ask you to look at it, please. The last paragraph, and have you—

A Yes, sir, I read the last paragraph.

* * * *

[41] Q What is their name?

A Evan Roth, Michael Gaylord Steele, William Robertson Harley.

Q Now, referring to exhibit five, the second document in that exhibit is an affidavit, is it not?

A That's correct.

Q And regarding that affidavit, was it prepared by Mr. Blackmer before you went in to see Judge Mechem

or was it prepared after you saw Judge Mechem or during the time that you saw him?

A I believe on this affidavit I prepared the affidavit and brought it to the U.S. Attorney's Office. Mr. Blackmer reviewed it. Together we went to see Judge Mechem.

Q Also in connection with the application of United States for an order, which is the top document, did you prepare that and submit it to Mr. Blackmer, or did he have it prepared?

A Mr. Blackmer prepared it.

Q Was that done after you showed him the affidavit, or do you know?

A I am not sure.

Q And the order itself, which is the third document, who prepared that?

[42] A I believe that was prepared by the U.S. Attorney's Office.

Q You did not prepare it?

A I do not believe so.

Q Looking at the affidavit in the first paragraph, you prepared this after considering the purpose of the affidavit, is that accurate?

A Yes, that would be correct.

Q You say after being first duly sworn, that there is probable cause to believe that Carl Muehlenweg and other confederates are committing offenses defined in certain statutes. You put that language in there, and you swore to it, right?

A Yes. I put that language in there with the assistance of Jim Blackmer of this Office.

Q With his insistence—

A With the assistance—

Q With the assistance of. At that time, you knew that Carl Muehlenweg was not a target for any investigation involving controlled substances, is that true?

A That is not true.

Q Well, regarding Carl Muehlenweg, you had arrested him before, had you not?

A Yes, sir.

Q And when did that arrest take place?

A I believe it was on April 25th, 1980.

[43] Q April 25th, 1980. He was working as an informant on September the 10th, 1980, isn't that so?

A That's correct.

Q You knew that when you made out this affidavit?

A Correct.

Q And he was working as an informant as a result of an agreement between he and the government with the concurrence of his attorney, Mr. Walker?

A That's correct.

Q You knew that at the time you signed this affidavit wherein you state that you had probable cause to believe that Carl Muehlenweg and others are committing offenses against the government?

A Yes, sir.

Q At that time that you signed the affidavit, you were looking to prosecute Mr. Muehlenweg—

A Correct.

Q —for any offense?

A No, that is not correct.

Q Well, at that time, you were not looking to prosecute Mr. Muehlenweg for any offense that may be occurring from this investigation?

A That would be correct, yes, sir.

Q So he was not a proposed Defendant, in your mind?

A He was not.

[44] Q But you put in the affidavit that you were investigating him to cause the Court to believe that he was a proposed Defendant, is that right?

A Yes, sir.

Q And that was not true?

A We were looking at—I was looking at Carl Muehlenweg and the company that he had in as much as

acquiring chemicals. And this investigation and in other investigations.

Q Well, Mr. Rottinger, at the time that you made the statement that he was being investigated as a Defendant or leaving that impression with the Court, that was not true?

A I did not state that Carl Muehlenweg was a Defendant.

Q But you stated that there was probable cause to believe that Carl Muehlenweg and others are committing offenses against—

A That's correct.

Q Well, you knew at that time that Carl Muehlenweg was not going to be a Defendant in any case arising from this matter?

A Arising from this matter, correct.

Q And he was an informant?

A Correct.

Q You did not disclose that to the Judge?

[45] A Yes, we did.

Q In this affidavit, confine yourself to this affidavit on September the 10th, where in the affidavit did you tell the Judge that Carl Muehlenweg was an informant working for the DEA? Show me in the affidavit, please.

A It is not in the affidavit. The U.S. Attorney that accompanied me to Judge Mechem's office, or chambers, explained the situation, why we were before a federal judge as opposed to one of the two magistrates currently here.

The reason being Mr. Muehlenweg's brother was currently a law clerk for the magistrate.

MR. MARCHIONDO: If the Court please, I ask that the witness be instructed to answer the question, and I move the statement he made be stricken.

THE COURT: Do respond to the question. Let's not go over the matter time and time again. Let's get to this and Mr. Smith will ask you to amplify if he wants you to.

Q My question to you, sir, was, will you show me in the affidavit any language that tells Judge Mechem that Carl Muehlenweg is an informant working for the DEA.

A It does not appear in my affidavit.

Q But that was a fact?

A That's correct.

[46] Q Now, you state in the affidavit that on March 3rd, 1980, that you executed a federal search warrant at locker number 170 at Aztec Self Storage facility in Albuquerque. Do you see that in the second paragraph?

A Yes, sir.

Q That had nothing to do with any of the Defendants regarding that search warrant, is that true? Let me rephrase it.

A What search warrant?

Q The federal search warrant at locker number 170 at Aztec Self Storage facility. That search warrant had to do with a Richard Logan.

A That's correct.

Q And only Richard Logan?

A Richard Logan and others.

Q Well, you didn't, in preparing that search warrant and the affidavit, disclose the names of any other person other than Richard Logan regarding the initial affidavit for that search warrant, isn't that so?

A I don't have a copy of that affidavit in front of me.

Q In any event, there is no disclosure in the affidavit, that the search warrant that was issued regarding locker number 170, regarded another person other than the Defendants in this case at this time?

A No. I just stated in that second paragraph that I obtained a search warrant and it was executed at the Aztec [47] Self Storage facility.

Q And then you used in that same paragraph the name of Carl Muehlenweg as being a person who appeared to have a connection with what was located in locker number 170?

A That's correct.

Q And even at that time—strike that.

Then you state on April the 25th, 1980, that you obtained another search warrant and you executed that at 619 Jefferson, Albuquerque, is that right? 619 or 519.

A 619.

Q And you talked about Graphic Photo Design throughout the entire paragraph, and you advised the court that there was amphetamine residue in the items that were picked up when you had the search warrant served on Richard Logan.

A On the storage facility, yes, sir.

Q And in that same paragraph, you did not disclose anything at all about finding any specific glassware or laboratory chemicals when the search warrant was served at the residence of Mr. Carl Muehlenweg, did you?

A Yes. In that same paragraph on the second page, I made mention that amphetamine residue and more such residue was also seized at the 619 address.

Q Excuse me. I see what you are saying. In parenthesis, [48] more such residue was at 619.

A Correct.

Q Before you executed that affidavit, you had discussions with Mr. Muehlenweg concerning some anhydrous ether?

A Correct.

Q The existence of it?

A Correct.

Q When was that first discussion with him?

A I believe it was the latter part of August, 1980.

Q In excess of 10 days before you prepared your own affidavit for your signature to obtain the order?

A Correct.

Q And he had told you that he had ordered 10 gallons of anhydrous ether?

A Correct.

Q And he told you where he had ordered it from?

A That's correct.

Q And you did not disclose that to the Court in your affidavit, either?

A I did not.

Q You did state, though, that he prepaid for the anhydrous ether in your affidavit?

A That's correct.

Q Now, you state that you verified with Mike Ronsiek, sales representative of BWR Scientific, Inc., that Graphic Photo [49] Design ordered 10 5-gallon cans of anhydrous ether. By verified, what did you do?

A I attempted to determine what was taking so long in getting that quantity of ether shipped to Graphic Photo Design.

Q Well, you say attempted. Who did you speak to?

A Mike Ronsiek.

Q When you attempted, what did you—What did you say and ask of him, if anything?

A I asked whether or not his company, BWR Scientific, was in receipt of a purchase order accompanied by a check for a quantity of ether.

Q And he told you?

A They had the check. They had the purchase order, but there had been some problem in putting or capturing the data requested.

Q Did you ask Mr. Ronsiek to expedite the shipment of anhydrous ether?

A Yes, I did.

Q But you didn't tell that to the Court in this affidavit?

A No. I did not.

Q And you asked him that before you prepared this affidavit?

A I asked for a tracer on the ether prior to the affidavit, yes, sir.

Q Well, did Mr. Ronsiek tell you that it would be shipped [50] to Graphic Photo Design in early September or did you ask him or did you tell him to make sure that it is delivered in early September?

A He stated it would be delivered. Subsequent problems were encountered in the trans-shipping of the two carriers from the bay area out here to Albuquerque.

Q In early September?

A Correct.

Q You didn't ask him to have it delivered in early September?

A I asked that it be expedited.

Q Did you know at the time that you made out this affidavit what day it would be delivered?

A No, I did not.

Q And then you asked Judge Mechem to consider to install the foregoing physical surveillance.

And by that, you mean what?

What did you mean by the "foregoing physical surveillance."

A Physical surveillance being the beacon transponder, beeper.

Q In the photo place?

A Yes.

Q To install the foregoing physical surveillance, you meant to be a beeper?

A Correct.

Q You wanted to install it in the five-gallon ether can [51] in order to enable the Drug Enforcement agency to follow the above items to their ultimate destination?

A Yes, sir.

Q Now, would you look at the same exhibit five and refer to the order.

Did you read the order after you received it from Judge Mechem?

A I am sure I did.

Q Well, you are certainly aware of its contents, were you not?

A Yes, sir.

Q Okay. And you say that that was—you are not sure how that was prepared, who prepared it, or what, the order itself?

A I believe that was typed at the U.S. Attorney's Office.

Q And it provides in the first portion of the order, well, first at the top, the preamble states, does it not, application under oath, having been made before me by Special Agent Richard Rottinger, Drug Enforcement Agency, for order authorizing the installation and monitoring of an electronic tracking beacon in a five-gallon can containing anhydrous ether ordered by Carl Muehlenweg representing Graphic Photo Design.

You read that?

A That's correct.

[52] Q And that states you were to—that the application was made as it states?

A Yes, sir.

Q And the court ordered that agents of the Drug Enforcement Administration may install and continuously monitor an electronic tracking beacon in the five-gallon can. It says in the five-gallan can containing anhydrous ether ordered by Carl Muehlenweg, representing Graphic Photo Design, 619 Jefferson, Albuquerque, New Mexico?

Do you read that?

A Yes, sir.

Q You did not install a beeper in a—or tracking beacon in a five-gallon can containing anhydrous ether ordered by Carl Muehlenweg, did you?

A Yes, we did.

Q Are you telling the Court that of the ten five-gallon cans, that came to Graphic Photo Design, or to a common carrier before it got to Graphic Photo Design, that you installed an electronic tracking beacon in one of those five-gallon cans?

A I picked up the ten five-gallon cans from the trucking terminal here in Albuquerque.

Q Excuse me. Would you answer my question.

THE COURT: That's all right. Let him go ahead. What happened?

[53] Q Okay. Fine.

A I picked up the ten five-gallon cans of ether from the trucking terminal. I made the substitution by emptying the contents of one of the five-gallon cans ordered by Muehlenweg into the beeper can prepared by our special testing laboratory.

I then took all the cans, the nine original cans plus our one beeper can to a local paint shop to be painted prior to providing those cans to Carl Muehlenweg.

Q Well, two things, then. You took—you had a special can made up by your special division?

A Correct.

Q And was anything distinctive about it compared to the other nine cans other than the installation of the beeper?

A. Yes. The can with the electronic installation as received by me in Albuquerque was a different color than the cans—

Q I'm sorry.

A Was a different color than the cans as received by the trucking.

Q So to make them all look the same, you had to take the other nine cans, appropriate those and paint those.

A We took all ten cans, including the beeper can.

Q You painted all ten one color?

A Correct.

[54] Q Is that because you could not match the color of the one can that you had made with the other nine?

A Yes, sir.

Q So then what you did is, as you stated, you made up a can, and took the ether and poured it from one of the ten cans into that can?

A That's correct.

Q It already had the beeper installed, it had the beeper installed in the can that you were pouring the ether into, is that right, before you poured the ether into the can?

A The beeper was already installed in an empty five-gallon can.

Q But this court order advised you to—that you may install in the five-gallon can containing anhydrous ether ordered by Carl Muehlenweg.

In other words, into a can that was ordered and purchased by Mr. Muehlenweg, that's what the order stated?

A Yes, sir.

Q So you didn't do that. You did things on your own to what you testified to?

A Yes, sir.

* * * *

[58] Q You did not disclose at that time either that Carl Muehlenweg was, in fact, an informant for you, did you?

A In my affidavit, no, sir.

Q And he still was an informant for you, was he not?

A Yes, sir.

Q His duties as an informant did not terminate at the time that you made this application for this continuation of the beeper?

A He was still an informant, yes, sir.

Q And he was an informant particularly on this subject?

A Yes, sir.

Q You did not tell Judge Mechem in this affidavit that you had, instead of installing a beeper in one of the cans ordered by Mr. Muehlenweg, that you had your own can made up, and installed a beeper in that and poured the ether from one can of the cans ordered by Mr. Muehlenweg into the made-up can? You did not disclose that?

A I did not explain that to the judge.

Q You did not tell him that you appropriated all ten cans and had them painted?

A No, I did not.

Q Of course, you did not appropriate all ten cans by any court order?

A No, I did not.

Q Now, in the affidavit, you state that on September the 20th, [59] James Connors Karo picked up 50 gallons

of anhydrous ether, including the one with the beeper. Did you see that? Did you see Mr. Karo pick that up?

A Yes, I did.

Q You were at—where did he pick it up from?

A From a residence occupied by Carl Muehlenweg.

Q And then in paragraph three you say on September 21st, by using the beeper signal, that the ether was stored at the residence of Richard Horton, is that right?

A That's correct.

Q Well, did you, in fact, at any time on September the 21st, determine specifically that the ether was stored at the residence of Richard Horton?

A Yes. Using the receiving equipment, I was getting a signal from our ether can.

Q In other words, you are saying that you had personal knowledge that the beeper had located this particular can in the residence of 315 Wellsley Place, Northeast?

A I had receiving equipment in my car that would pick up the signal. I had picked up the signal that evening at 315 Wellesley.

Q Well, that residence was not the residence of Richard Horton, was it?

A Yes, it was.

Q How did you determine that?

[60] A Utility checks, telephone subscriber.

Q At 315 Wellsley Place, Northeast?

A 315 Wellsley.

Q Isn't that the residence of Richard Horton's father and mother, Benjamin Horton?

A To my knowledge, it is the residence of Richard Horton and Miss Tara Horton.

Q Well, Mr. Rottinger, you determined in your investigation prior to this date the person occupying the residence at 1108 Monroe, Southeast, to be James Connors Karo?

A Correct.

Q And did you determine the residence of—Didn't you determine that this—there was a residence of Mr. Richard Horton on Rio—some street, I can't think of it—Rio something. Do you recall that residence?

A Rio? No.

Q Excuse me. I'm sorry. 1808 Rita Drive.

A Rita Drive, I believe to be the residence of Benjamin Horton, Richard's father.

Q Now, you advised Judge Mechem that this beeper led you to 4701 Cutler, Northeast, a U-Stor-It, mini warehouse, and you determined then that that was registered in the name of Richard Horton, right?

A Yes, sir.

Q And he had been the lessee of that locker number 143 for [61] approximately two years, or about a year and some months?

A I don't recall the time frame. The lease agreement was in Richard's name.

Q And you determined from the beeper signal that with the ether being in there, you knew then that Richard Horton made at least claim to the locker itself?

A Storage unit locker number 143 was in Richard's name.

Q On October the 7th or 8th, did you rent a locker at the U-Stor-It mini warehouse locker area?

A Did I rent one? I cannot recall renting a locker.

Q You never rented a locker at the U-Stor-It mini warehouse locker?

A I'm sorry. There might have been a rental of an adjoining locker.

Q I'm sorry. I didn't hear you.

A There might have been a rental of an adjoining locker to 143.

Q That would be 142?

A The time frame you asked me, October 7th, I don't recall the date.

Q Well, did you, in fact, rent adjacent to this locker at or about the time that Judge Mechem signed this

order on your affidavit, a locker from the same place where 143 was located?

A I believe we rented a storage unit in that same facility, [62] yes, sir.

Q I asked you, sir, if you did not do it yourself?

A Yes, sir.

Q And before you rented it yourself, you had spoken to the owners of the locker facility to determine who owned 143?

A I had served an administrative subpoena on the resident manager, yes, sir.

Q Did you, at any time, disclose to Judge Mechem that you had rented a unit next to 143?

A No, I did not.

Q You never disclosed that to Mr. Blackmer, either, did you?

A I don't recall whether I have or not.

Q 142 you rented and you installed some video tape equipment, did you not?

A I did not.

Q Did somebody else do that?

A There is no video type installed there.

Q Why did you rent unit 142 adjacent to 143?

A We made application—I made application for an entry tone alarm to be installed on Richard Horton's door, 143. That required running hardware or AC cable to a storage locker. That was the reason for renting the adjoining locker. There was no video at the Cutler address.

[63] Q Let me show you exhibit seven, and have you look at it.

MR. SMITH: If it please the Court, has exhibit six been offered?

MR. MARCHIONDO: Yes, it was offered and admitted. I'm sorry. I didn't mean to respond for the Court.

THE COURT: I'm not keeping a list.

THE CLERK: Yes.

Q (By Mr. Marchiondo) If you look at seven, sir—

A Yes, sir.

Q —you are familiar with seven?

A Yes, I am.

Q Would you tell the Court what it is in the chronology you have it there?

A I have a court order with a date filed with district court October 8th, 1980, signed by Judge Mechem. I have an application for an entry tone alarm signed by James Blackmer, U.S. Attorney's Office.

I have an affidavit prepared by James Blackmer in which I am the affiant.

Q Are those the only documents in that exhibit?

A There is also a copy of the earlier or the initial application for the five-gallon can containing anhydrous ether. My affidavit and Judge Mechem's court order.

Q Signed on the 10th day of September, 1980?

A That's an attachment.

[64] Q For the record, though, are you saying—May I approach the witness, Your Honor?

THE COURT: Yes.

Q Are you saying that the document in this exhibit is prepared by the U.S. Attorney's Office following your affidavit? The application is dated September the 10th at the bottom, the affidavit in support of an application attached to it dated the 10th, and the order, were actually part of the package which consists of the order, which are the first three pages, your affidavit, which consists of seven pages, is that what you are saying that was submitted to Judge Mechem?

A I believe it was submitted as a package, yes, sir.

Q Are you certin of that?

A Apparently.

Q Are you certain of that?

A No, I am not certain.

Q Looking at the application itself, in that—or the affidavit in that exhibit, that you signed, there is some

writing on it. Just tell us the date regarding the writing?

A On my affidavit?

Q Yes.

A Are you speaking of on the last page?

Q Yes, sir.

[65] A Reviewed by the U.S. Attorney, Assistant U.S. Attorney, Jim Blackmer, 7 October, 1980, 2:15 p.m.

Q Did you prepare this affidavit at the same time or about the same time that you prepared the affidavit in exhibit 6, since it is dated the 7th?

A I believe both the court orders were prepared and brought to Judge Mechem on the 7th, yes, sir.

Q So do you recall what day it was that you leased unit 142?

A No, I don't.

Q In the affidavit that you have before you regarding the entry tone alarm inside Mr. Horton's leased locker, do you state anywhere that you were going to rent an adjoining locker for any purpose whatsoever?

A I can't recall. I would have to look over the affidavit.

Q Please look at it.

A It does not mention acquiring an adjoining locker.

Q But you were going to do that before October the 7th, were you not?

A Yes, sir.

Q And you had already made arrangements with the owner of the premises to lease locker 142?

A I made arrangements with the resident manager to lease one of the adjoining—I don't recall the number.

Q Did you at any time before you—excuse me. Did you rent 142 before this device was installed, or afterward?

[66] I am talking about now the tone alarm.

A We utilized the adjoining facility when installation of the entry tone alarm was made. So I don't recall the date the entry tone alarm was installed by our technician.

Q Who was the technician, Dan Baxter?

A Dan Baxter.

Q Did he look at the layout of the property before you went to Judge Mechem to see what you would have to do to install the tone alarm?

A I believe he did. He was out there with me.

Q Did he go to unit 143?

A Yes, sir.

Q Was any effort made to look inside of 143?

A To get into 143, not prior to the court order.

Q Not prior to the tone alarm system court order?

A Correct.

Q After the order you had already had Dan Baxter do the installation, correct?

A Correct.

Q What time did you go to the 143 to install the tone alarm system?

A I would have to look at my report.

Q Would you look at it, just give us the time, please?

A I don't have a copy of it here.

MR. MARCHIONDO: Would you mark this as Defendants' [67] Exhibit—Your Honor, how do you want us to handle Defendants' Exhibits? We had some exhibits on one motion. How do you desire the Defendant mark their exhibits for other motions?

THE COURT: Just however suits you. For purposes of motion hearing, just keep them going in sequence, why don't you.

THE WITNESS: I found my report on that dated October 9th. The installation indicates technician Dan Baxter had installed the entry tone alarm on October 9th, 1980, at approximately 3:15 p.m.

Q Did you have any knowledge that the beeper installed in the can in which you installed it, the beeper itself, had failed to transmit before October the 7th or 8th or 9th?

A No.

Q It did not become faulty at all?

A The beeper in the can, no.

Q No requirement that it be changed?

A Not at that time.

Q Was the requirement that it be changed at a later time?

A No.

Q Did you accompany Mr. Baxter to the unit 143?

A Yes, I was present during the installation.

Q Did you assist in the installation of it?

[68] A I ran some cable for him, yes, I did.

Q Did you get inside of 143?

A To install the entry tone alarm, yes. The door was opened.

Q And you and he got inside that particular storage unit, did you not?

A Correct.

Q And could see the cans in the storage unit?

A Yes, sir.

Q At the time that you filled out your application in exhibit seven, wasn't one of your purposes to install this tone alarm system to make sure that the ether was still in that locker?

A The entry tone alarm would only tell us whether the door was ajar. We still were receiving the signal from the anhydrous ether can.

Q But you wanted to make sure, did you not, before you made application for the tone alarm system, that all of the ether was still in that locker and not just the one can with the beeper in it?

A Until the storage unit 143, until the door was opened, we could not be sure that the entire ten five-gallon cans would still be there.

Q My question to you was, you wanted to make sure that all ten cans were still in that locker and not just the one [69] can with the beeper; thus, you sought the application for the tone alarm system so that you could look inside the area while it was being installed?

A No, you are wrong. The entry tone alarm would be a physical surveillance aide to enable us to know when that door might be opened. It would not tell us whether any of the ether cans had been moved.

Q We understand that. But in order to install the alarm system, you had to get inside the storage unit?

A The entry tone alarm was, in this case, was installed within the door jamb. When the door was opened a required distance, it would activate a signal.

Q I thought you testified that you and Mr. Baxter got inside this storage area?

A To install the tone alarm system.

Q And were you standing inside?

A Yes, sir.

Q And you could see everything in sight in this locker room?

A Correct.

A And you say it took both you and Mr. Baxter to do this?

A I assisted Dan Baxter on the installation. I believe there might have been other agents there outside the U-Stor-It facility.

Q Was there any other purpose of the 142, renting of that unit, beside you say running wires from 143 to 142?

[70] A We ran wires from 143, had to drill out the door jamb through some concrete into the adjoining locker that we had rented. From the adjoining locker we also had to drill and place an antenna. It was an RF signal so we could receive a signal when that door might be opened.

Q Did anybody occupy 142 from the time that it was leased by you to the time that the lease terminated?

A Did we occupy it?

Q Anybody occupy it?

A We had strung some hard wire through that storage unit, yes, sir.

Q I mean any individual from the DEA or any place else get inside the locker 142 and observe 143?

A To observe one from the other, no.

Q Nobody was in 142 at all other than the installation?

A I was in 142 during the installation.

Q And after the installation, which occurred on the 9th of October, then nobody else was in 142 for any other purpose?

A Not to my knowledge.

Q You could have surveilled the 143 locker by having somebody stay in 142, could you not, to determine who was coming and when it was going to be opened and things of that sort? You could have done that?

A I don't believe so, because the lockers, as you said, were adjoining and they were in a common line. I don't [71] think you could see the entry of one from within the other.

Q Now, there came a time when the order that you have there, exhibit 6, terminated. What day did it terminate?

A Exhibit 6 is the extension for the 90 days?

Q Yes.

A January of '81.

Q What date in January of '81 could you state to the Court that it terminated?

A I am not sure.

Q Okay. Now, regarding exhibit 8, if the Court please, at this time, we move the introduction of Exhibit 7.

Can I have a moment before I make that request, Your Honor, to show something to counsel?

Your Honor, at this time, I withdraw my request to introduce exhibit 7.

I am going to hand you exhibit 6, Mr. Rottinger, and have you look at that—Excuse me. Exhibit 8.

MR. SMITH: Your Honor, we will offer exhibit 7. The witness has testified about it, at some length.

MR. MARCHIONDO: The only problem we have at this time, we seriously—

THE COURT: Which is seven, the affidavit?

MR. MARCHIONDO: Yes, the affidavit. The question is whether it was attached.

[72] MR. SMITH: No, it is the whole package, Your Honor. The entire package of order, application, and affidavit filed on 8 October, plus the attachments of 10 September.

THE COURT: You can offer your eight and then you can offer seven on cross examination, Mr. Smith.

Q (By Mr. Marchiondo) You have eight there, sir?

A Yes, I do.

Q By the way, did the tone alarm entry system work that was installed in 143?

A It was operational when it was installed. We had a malfunction. We were not notified by way of signal when the door was opened.

Q Up to the time that that door was opened, you received information it was—are you stating to the Court that there was no video of any kind utilized in connection with locker number 143?

A There was no video on locker 143.

Q Was there any other type of surveillance besides the tone alarm and the beeper that was inside the can, up to the time that the anhydrous ether was removed from locker 143?

A There was no other electronic surveillance.

Q Any other type of surveillance?

A The vehicular surveillance continued throughout the rest of the investigation.

[73] Q Did vehicular surveillance stay constantly on locker 143?

A No. That was the reason for installing the entrance tone alarm.

Q After it was installed, did you continue vehicular surveillance on locker 143?

A On a daily basis, no.

Q How often was that done?

A I can't recall being back there until after the contents of unit 143 were removed.

Q What day were they removed, if you remember?

A I believe it was 16 October, '80.

Q Approximately seven days after it was installed, after the tone alarm system was installed, the contents was removed?

A Correct.

Q Well, Mr. Rottinger, in your affidavit you stated that normal surveillance would not be adequate. You did continue to surveil the 143 not on a daily basis, but you continued to surveil it by automobile, is that correct?

A No, that is not correct. Vehicular surveillance was not maintained on the unit 143, but on subjects of the investigation.

• • • •

[82] Q You did not advise Judge Mechem at that time that exhibit 6, the order of exhibit 6, had terminated?

A I did not.

Q You did not ask to install a new beeper or did not ask for permission to enter upon anybody's property to install a beeper in that affidavit?

A Correct.

Q But you did know at the time you signed the affidavit, submitted that, the order in October of exhibit 6 had expired?

A Yes, sir.

Q Now, after it expired, did you continue to surveil the area where the beeper was located by some other type of surveillance?

A Yes. By the time the latter affidavit, there was video installation, large microwave video installation on storage unit 15 on Baylor, Southeast.

Q Who did you get an order to do that by?

A That was not court ordered.

Q When did you install the video then on the premises where number 15 was located? What is the name of that company, by the way?

A That is U-Stor-It mini warehouse, I believe it's 2640 Baylor, Southeast.

Q Okay. And you installed a video. Who installed it? [83] A Dan Baxter, our technician, again.

Q Do you know what day he installed it in relation to these two orders?

A Early November, as best I can recall.

Q Of 1980?

A Correct.

Q From 1980 then, you had a video surveillance on unit number 15, is that right?

A Correct.

Q And in your affidavit of January the 13th, which is exhibit 9, you did not disclose that to the Court that you had video observation of this unit?

A I did not.

Q Did you determine from Mr. Blackmer or did you tell him that in fact the order of—being exhibit 6, had terminated?

A I contacted the Assistant, James Blackmer, and notified him that our first extension had expired and would be requesting a renewal.

Q And then it was operating from the time it expired up until the time you got the order in exhibit 9, the beeper was operating?

A Correct.

Q And you were monitoring that beeper during that time?

A Yes.

Q Nothing had changed in the type of surveillance that you [84] had used before you sought the order in exhibit 9 that existed before that time and during the time that the order expired in exhibit 6?

A Exhibit number 9, we would have already had the microwave video on the storage unit door.

Q I understand that. But nothing changed in the way that you were surveilling this property by beeper, and by video from the time that the order in exhibit 6 expired up until the time you got the new order in exhibit 9, nothing changed at all?

A By way of microwave video, we were able to determine that no entries had been made into storage unit 15 by way of video.

Q But you kept the same type of surveillance, is what I am getting at. You didn't change anything. From the time that your order terminated.

A Microwave video was not pursuant to court order.

Q You didn't change your surveillance, you had the beeper surveillance still going on at the time that the order had terminated?

A I don't recall whether that weekend or six days or three days, as you said, whether I had receiving equipment in my vehicle at that time.

Q Well, you didn't change anything deliberately, you didn't stop the beeper or quit using it?

[85] I could not stop the beeper.

Q But you did not stop monitoring?

A I may not have been physically out there with the receiving equipment in that we now had microwave video and that showed me that no entries had been made.

Q Where was the video located where you could see it?

A At my office.

Q Here in—

A In Albuquerque.

Q Across the street, or where is that office located?

A In the First National Bank Building, Northeast.

Q Well, in that affidavit that you filed on the 9th to ask for a continuance of beeper, all of that up to that point in time, you had not seen Horton with any cocaine or any other controlled substance, had you?

A Up until what date?

Q Up until the date of January 13th, 1981?

A That is incorrect. December 31st, New Year's Eve, Mr. Horton and Mr. Rob Harley were at the storage unit number 15 as seen by myself on microwave video.

Q Sir, my question was this: Up until you filed that affidavit with the Court in exhibit 9, you did not see Mr. Horton with any cocaine or amphetamines or any other type of drug as a result of your surveillance?

A I did not see Mr. Horton with any contraband.

* * * *

[91] Q And you put in the second paragraph, or the first paragraph of the first affidavit that you had issued a search warrant to search a locker you knew at that time that was owned by Richard Logan?

A Correct.

A And you knew at that time that Richard Logan, at the time that you made out the affidavit, had nothing to do—I mean he was dead, therefore, he would not have anything further to do with anything you found back in March of 1980, when you made out the affidavit, is that right?

A In March of '80, Richard Logan was alive. That was the execution of it.

Q I misstated that. After he killed himself, the day that you gentlemen served the search warrant, which was in March of 1980, is that true?

A He killed himself subsequent, correct.

Q In the month of March?

A I believe it was May 17th of '80.

Q Okay. In any event, he was dead before your affidavit was made to Judge Mechem to ask for permission to install a beeper?

A Correct.

* * * *

[97] Okay. Were you watching the video that was installed and directed against unit number 15 on February the 6th, 1981?

A Yes.

Q And were you able then to see anyone remove anything on that date by video?

A Yes, sir, on two occasions.

Q On February 6th?

A Correct.

Q And weren't you able to identify who that person was?

A Subsequently, yes, sir.

Q When you say subsequent, when did you mean?

A Subsequent to viewing the other video on the 6th, I identified the individual, one of the individuals.

Q When did you first make that identification as to a person being on the video and who was that person?

A The individual on the video in Richard Horton's truck was a Gene Rhodes, accompanied by a Caucasian female.

Q Did you identify her?

A No, I did not.

Q Did you know then it was Gene Rhodes on February the 6th, that was removing items from this locker?

A Did I know by name? No, I did not.

Q By face, you knew it was not Mr. Horton?

A Correct.

[98] Q Is that right?

A Yes, sir.

Q I want to refer to your affidavit under oath on page three, and ask you to look at the last paragraph.

A Oh, I don't seem to have the numbered pages.

Q Oh, is it blocked at the top? You can't see that. You do have it there. It starts out with the language, "We maintain surveillance." Do you see that?

A Yes, sir.

Q Going on to the next sentence, you stated under oath for this affidavit and for the search warrant on 6 February, 1981, we observed on a video tape from a camera located elsewhere in the area, but not at or in locker 15 or its critilege, Richard Horton and a female

apparently unload some—bring out numerous five-gallon cans into the rear bed of a pickup truck.

You stated Richard Horton, and you previously stated under oath here that you knew at that time that that was Mr. Rhodes.

A No. Subsequent, I stated subsequent to viewing the video of February 6th, I identified the male as being Gene Rhodes. Gene Rhodes was operating Richard Horton's vehicle that date. That's why I thought it.

Q Mr. Rottinger, you just testified a moment ago when I [99] asked you on February the 6th, when you looked at the video, it certainly was not Richard Horton, you said, is that correct?

A I know that the video, the male on February 6th at the storage unit was not that Richard Horton, but rather Gene Rhodes.

Q Well, prior to that paragraph, you made several mentions regarding Mr. Horton prior to that particular paragraph. For all the preceding paragraphs, Mr. Horton's name appears and Mr. Rhodes' name does not, does it?

A My first observation in this investigation of Gene Rhodes would be that of February 6th, twice at the storage unit emptying—

Q Sir, I am asking you a question. Before you got this paragraph on page three, dealing with Richard Horton as being the one who removed the items, you discussed at length Mr. Horton's alleged participation in moving around the anhydrous ether, am I accurate in that?

A Correct.

Q You mentioned the fact that he owned, as you put it, a red and white pickup truck?

A Correct.

Q And so you, in order to have continuity with this affidavit, and to give it more substance and to have the person be the same, you inserted the name of Richard [100] Horton as the one who was on the video removing

the chemicals from those lockers when you knew otherwise?

A That is not correct.

Q That is not correct. Let's go on. This affidavit that you signed, by the way, was dated February the 8th, two days after February 6th. Or at least a day-and-a-half. 10:45 p.m., am I right about that?

A 10:44 p.m. Yes, sir.

Q And you certainly knew before February the 8th, 1981, that Richard Horton wasn't the man who was in that video, as you previously testified?

A On the 8th, I did not know that that was not Richard Horton. I did not have Mr. Rhodes identified at that time.

Q Now, you followed that beeper can in the truck on the 6th, is that accurate?

A Yes, I did.

Q And your affidavit, you say you all followed that vehicle and another vehicle up to Taos, New Mexico?

A That's correct.

Q You could see the drivers of the various vehicles, could you not?

A No, I could not.

Q It was at night?

A It was in the evening, yes, sir.

Q And you could not identify the drivers of either vehicle?

[101] A Both vehicles stopped, I believe on two or three occasions going north, but I was not close enough to physically see it. I had some monitoring equipment in my car and stayed behind in surveillance.

Q The only way that you could stay behind them was to continue to follow that beeper signal, is that accurate?

A That's negative. We had a bureau aircraft up at the time.

Q And you had air surveillance as well?

A Correct.

Q At night?

A Correct.

Q Any other type of surveillance besides the beeper and the aircraft?

A Another vehicular surveillance.

Q Behind this car and this truck, or how?

A On most occasions, we would be behind, yes, sir.

Q In your affidavit, after you decided, or recited that it was removed, and you saw these people by video, you say that they were the two persons who were obtaining these cans from inside locker 15, and taking them to the pickup truck and you located them on the truck, and then using the beeper locater, you picked up the signal and followed to 315 Wellesley, Northeast, right?

A The area of Wellesley, Northeast. I was—

[102] Q But it did not stop there?

A I was in the area of Richard Horton's residence. The pickup truck containing the beeper and anhydrous ether did not come to Richard Horton's residence, but rather continued north out of that area.

Q Going on, Mr. Rottinger, were you the one that was following the truck, the red and white truck?

A On what occasion?

Q I am talking about the 6th. I am going by your affidavit, if you will just kind of follow me. I am just asking who was the DEA agent who was following the truck on the 6th of February after the merchandise was removed by Mr. Rhodes and a woman from locker 15?

A Several agents were involved in vehicular surveillance at that time.

Q Were you in one of them?

A Yes, I was.

Q Who else was in the others?

A Agent Hastings, Robert Hastings, group supervisor, Robert Nunning. I believe there was an APD officer, Richard Espinosa. And another agent. I would have to look at my 6 to see on that surveillance.

Q Before you made up that affidavit, you certainly consulted with them on what they saw, did you not?

A Yes, sir.

[103] So you know from their identification plus your own investigation who and what occurred before you prepared this affidavit?

A That's correct.

Q All right. Going on in your affidavit, looking on the next page, page four, you state that the beeper locater picked up a beeper signal in the area of 315 Wellsley, Northeast, but not apparently emanating from that particular residence, which is the Horton residence, is that what you state?

Do you follow that? Have you located that?

A I haven't located that, but that's correct.

Q I want you to follow that because there is something I want to point out to you on that page.

A Where are you?

MR. SMITH: I think Mr. Marchiondo said on the next page. That's still on the page we were talking about.

Q Page four.

A You said the next one.

Q Sorry. Page four.

A Yes, sir.

Q You see the word "residence."

A Horton residence.

Q And continue. The next sentence, several minutes later

* * * *

[DIRECT EXAMINATION OF DEA AGENT ROBERT HASTINGS BY RESPONDENT HORTON]:

* * * *

[108] I could be wrong.

Q Using that day as a date of reference and going back, could you tell the Court when you first got involved with this investigation?

A Of the ether?

Q Yes.

A It was the first part of September.

Q Was it before September 10th, 1980? Was it before Mr. Rottinger obtained authority from the Court to install a beeper in a can of ether that was being purchased by Mr. Muehlenweg?

A We had received information prior to that, that's correct.

Q Did you receive information from Mr. Muehlenweg?

A No, sir. From Mr. Rottinger.

Q In that information, did you know that Mr. Rottinger possessed information that the ether was being purchased for the purpose of extracting cocaine?

A Yes, sir.

Q Was there any discussion that the ether was going to be used for the extract or making up of amphetamines?

A No, sir, not to my knowledge.

Q In fact, amphetamines were never mentioned, to your knowledge, during this investigation?

A That's correct.

[109] Q Particularly cocaine?

A Yes, sir.

Q Did you review the affidavit of Mr. Rottinger in connection with the application made with the Court on September 10th, which is Exhibit 5, concerning the order?

A No, sir.

Q Did you have anything to do with the preparation of any subsequent affidavit?

A No, sir.

Q Now, you were present on February the 10th, 1981. When you entered the premises, were you able to identify any person in there as being any named person that you were aware of?

A No, sir.

Q Did you know who Mr. Horton was?

A No, sir.

Q Did you know him by identification by appearance?

A By description only.

Q Before you walked in on February 10th?
A Yes, sir.
Q And who provided you the description?
A Agent Rottinger.
Q Agent Rottinger?
A Yes, sir.
[111] A Height, weight, color of hair, approximate age.
Q Were you with any of the agents that observed the video that was located on the premises of a U-Stor-It which was aimed at locker number 15?
A Which video? Any video?
Q How many videos were there?
A One. How many tapes; there was three, I believe.
Q Were there more than one video at a location other than at one storage unit?
A No, sir.
Q Just one video?
A Just the one video.
Q Regarding that video, was that set on locker 15 at the U-Stor-It business?
A Yes, sir.
Q Did you have occasion to view any of it prior to February 10th, now, 1981, any of the video reproductions?
A Yes, sir. I observed one of the tapes.
Q Were you observing the tape when anything was removed from locker number 15?
A No, sir.
Q Did you surveil on February the 6th, 1981, a pickup truck, red and white, and a blue automobile?
A Yes, sir.
Q Were you able to identify the drivers of either vehicle?
[112] A I observed the drivers of both vehicles.
Q Were you able to identify who they were?
A Subsequently, yes.

Q By "subsequently,"—what do you mean by "subsequently"?

A After the 10th.

Q After the 10th?

A Yes, sir.

Q And who did you identify driving any vehicles on February the 6th, after the 10th of February, 1981?

A Mr. Rhodes.

Q And anybody else?

A Yes, sir, but I don't remember the female's name.

Q What vehicle was Mr. Rhodes driving?

A The red and white truck.

Q Did you determine who owned the red and white truck?

A Me, personally, no, sir.

Q Did anybody, to your knowledge, with the D.E.A.?

A Yes, sir.

Q Who did?

A Mr. Rottinger. Agent Rottinger.

Q Who owned the truck?

A Mr. Horton.

Q Richard Horton?

A Yes, sir.

* * * *

[116] Q And that was after everybody was secured downstairs?

A Yes, sir.

Q You came downstairs, and then what did you do?

A Placed the people there under arrest and I advised them of their rights.

Q Who is that that you placed under arrest?

A Mr. Horton, Mr. Steele, Mr. Roth, Mr. Harley.

Q And how did you place them under arrest?

A I advised them that they were under arrest.

Q For what, sir?

A Violation of federal narcotics laws.

Q Who was present when you did that?

A All the agents and officer personnel that were in the house.

Q Well, did you have them handcuffed after you put them under arrest, or were they handcuffed when you put them under arrest?

A They were not handcuffed.

Q At all?

A As far as I know.

Q During the time that you were there in the house, they were not handcuffed?

A They were handcuffed later.

* * * *

[120] Q What did you hear Mr. Rottinger say to Mr. Horton at that time?

A I do not recall.

Q Mr. Horton did not volunteer to go upstairs, did he?

Q That, I am not positive about.

Q Did you hear anything at all that Mr. Rottinger said to Mr. Horton just before Mr. Horton and he went upstairs?

A No, sir. I was in another room.

Q But you did see him take him upstairs, then Mr. Rottinger take him upstairs?

A I did see—Mr. Horton accompanied Mr. Rottinger upstairs, yes, sir.

Q And Mr. Horton was not handcuffed at that time?

A No, sir.

Q Did you have anything to do with the preparation of the affidavit for the search warrant?

A No, sir.

Q You did not provide any information in the search warrant that was signed by Mr. Rottinger to obtain the search warrant?

A I gave Mr. Rottinger information of what I observed on the surveillance conducted on February 6th.

* * *

* * * *

[CROSS-EXAMINATION OF HASTINGS
BY RESPONDENT KARO]

* * * *

[124] Q You didn't offer him—did anyone offer him anything, to your knowledge?

A I don't know. Agent Rottinger spoke to him.

Q Did you speak with Mr. Muehlenweg at the time any such arrangements were made, if they were made?

A No, sir.

Q Now, are you aware, Agent Hastings, of what success, if any, Mr. Muehlenweg had in supplying anyone with the D.E.A., including Agent Rottinger, with information with respect to violations of the drug laws committed by others between the period of spring, 1980, and, say, August, 1980?

A Yes, sir. I am familiar with some of the information.

Q Was that information with respect to a man named Logan?

A Yes, sir.

Q Was there any information supplied with respect to anyone else?

A Yes, sir.

Q Who was that?

A Mr. Horton and Mr. Harley.

Q That has to do with this investigation?

[125] A Yes, sir.

Q It didn't have to do with some other acts by Mr. Horton and Mr. Harley other than the ones before the Court here?

A No, sir. Other information was supplied regarding some possible purchase of cocaine.

Q Now, was that prior to August of 1980?

A I am not sure.

Q Let me ask you this: Was there any information supplied, to your knowledge, by Mr. Muehlenweg, about anything other than Mr. Logan, or the matters that

are associated with the investigation which has resulted in this prosecution?

A Not to my knowledge.

Q Not to your knowledge?

A That's right.

Q So the only information that he supplied prior to this was what, with respect to Logan and Mr. Logan subsequently killed himself, is that correct?

A That's correct.

Q And Mr. Logan killed himself before you were able to initiate a prosecution against him?

A Before we were able to get him out of his car.

Q Now, did you discover any contraband on Mr. Logan?

A Yes, sir.

Q At the time that he was—in his car, at the time that [126] he killed himself?

A Yes, sir.

Q Had Mr. Muehlenweg alerted you to the presence of that contraband?

A Yes, sir.

Q How had he done that?

A He advised Mr. Rottinger of what Mr. Logan was going to be picking up.

Q What was that?

A I believe it was either. Maybe methylene. I'm not positive on that. I'd have to check it.

Q Are those chemicals or precursor chemicals that were supplied to Mr. Logan by Mr. Muehlenweg?

A Yes, sir.

Q And did Mr. Muehlenweg supply those chemicals under controlled circumstances similar to the circumstances that the chemicals in this case were allegedly supplied?

A Yes, sir.

Q Did Mr. Muehlenweg supply any other information about Mr. Logan other than the fact that he would be acquiring those chemicals from him?

A Yes, sir. But he did not supply that information to me.

Q Do you know what that information was?

A No, sir. I'm not positive.

Q Have you heard what that information was?

[127] A I really didn't discuss it with Agent Rottinger.

Q So is it your testimony, then, that you have no understanding, as a result of any discussions with Agent Rottinger, as to what that information would have been?

A I'd have to say that at this time, yes, sir.

Q You understand that I'm asking you for hearsay information as well as direct information?

A Yes, sir.

Q And your response is still the same?

A No, sir.

Q What is your response, then?

A Mr. Muehlenweg also supplied us with other information regarding Mr. Logan, other than that one instance where the chemicals were picked up.

Q What information was that?

A It was regarding various associates of Mr. Logan, and what they were planning to do.

Q Who were they?

MR. SMITH: Your Honor, I think at that point we are at the point where the information is sensitive and I'd have to object to further inquiry.

THE COURT: Objection is sustained.

Q (By Mr. Boyd) Let me ask you this, Agent Hastings. With respect to that other information, have you been able to verify that information?

[128] A Only to a certain extent.

Q To the extent that you have verified it, when did you verify it?

A I cannot give you an exact time.

Q Can you give me an approximate time, please?

A Not even that, no, sir.

Q Can you give me a month in which the verification occurred?

A I would say approximately two months after Logan committed suicide.

Q Which would have made it when?

A I'm not sure.

Q Sometime in the late summer of 1980?

A Yes sir.

Q When you say you partially verified it, does that mean that as a result of other information you gathered, that you now more strongly suspect that the information is true?

A Yes, sir, I'd say so.

Q Is that a fair characterization, since we can't go into it?

A Yes, sir.

Q Now, with respect to the investigation which has resulted in this prosecution, isn't it a fact that Mr. Muehlenweg supplied you with, first of all, the [129] nature of the substance which, according to his understanding, would be involved? I think Mr. Marchiondo asked you that before.

A Yes, sir.

Q Isn't it also accurate that he supplied you with the names of all the participants?

A As many as he knew.

Q Who were those that he knew, to your knowledge?

A The only names that were mentioned to me were Mr. Harley, Mr. Horton, Mr. Karo.

Q You do not recall a mention of Mr. Steele or Mr. Rhodes?

A No, sir.

Q And he supplied you with those names and that information prior to the acquisition of ether did he not?

A Yes, sir.

Q So you knew all that. Did he also supply you with information with respect to the manner in which the

cocaine was to be processed? His understanding with respect to the manner that it would be processed?

A His understanding of it, yes, sir.

Q And his understanding that he communicated to you, then, was that it would be brought in in clothes?

A Yes, sir.

Q And that the ether would be used to precipitate it out of clothes?

[130] Yes, sir.

Q Was there any other information that I have not mentioned, and I say I have not mentioned in general that he supplied you with respect to this, the investigation resulting in this prosecution, that I haven't mentioned just now?

A Not that I can think of.

Q That, then, is a fair summary of the information that he did supply?

A Yes, sir.

Q And all of that information was supplied prior to the delivery to Mr. Muehlenweg of the ether from the distributor?

A That's correct, yes, sir.

MR. BOYD: May I have a moment, Your Honor?

Q (By Mr. Boyd) Just to clarify, Agent Hastings, we were discussing earlier in my examination, the investigation with respect to Logan and the investigation which resulted in this prosecution. Those two investigations were unrelated, were they not?

A Yes, sir.

MR. BOYD: Thank you. That's all I have.

THE COURT: Anybody have anything further, nonrepetitive?

MR. TWOHIG: I have a few things, Your Honor.

* * * *

[135] MR. TWOHIG: No further questions of this witness.

MR. BARGAS: I have a few questions.

THE COURT: Counsel, you all have to get organized better than this. I know every lawyer thinks he can do it better than every other lawyer, but you can coordinate better than this. Go ahead and go on with this witness. Between now and tomorrow get organized and coordinate.

[CROSS-EXAMINATION OF HASTINGS BY DEFENDANT RHODES]:

BY MR. BARGAS:

Q Agent Hastings, on February the 6th, you have testified that you have observed Mr. Rhodes in a pickup truck with some cans of ether. Where were you when you made that observation?

Q In my vehicle.

Q Where was your vehicle parked?

A It was not parked.

Q What brought your attention to this pickup truck?

A We had been following it up to Taos.

Q When did you start following it?

A I believe it was around 6:30, somewhere in there, maybe earlier. I'm not sure.

Q Where were you in the State of New Mexico when you first started following this pickup truck?

A I first observed the pickup truck approximately one [136] block east of Mr. Horton's residence.

Q Was the pickup parked at that time?

A No, sir. It was in back of me. Moving.

Q Who was driving it?

A I could not tell at that time.

Q Where was Mr. Rhodes in the truck?

A I could not tell who was driving the vehicle. There was only one person in it.

Q Pardon me?

A There was only one person in the vehicle at that time, and I could not tell who was driving the vehicle.

Q Can you describe what the person looked like who was in that vehicle?

A At that time?

Q Yes.

A No, sir, I cannot.

Q Later on, were you able to get a—

A Yes, sir.

& —a better view?

A Yes, sir.

Q When was that?

A That was when we arrived in Taos.

Q And where were you with respect to the vehicle when you were able to make this observation in Taos?

A The vehicle had stopped alongside the road across the [137] street from the Sagebrush Inn. I was driving by as Mr. Rhodes exited the vehicle and crossed the street.

Q Was anybody with him at that time?

A In the vehicle?

Q Yes.

A No, sir.

Q How were you able to identify that person as Mr. Rhodes?

A We received information after the other subjects in this investigation had been arrested and he was identified through that information.

Q How was he identified as a person driving that truck, directly or through a description to you?

A It was originally a description, and after I saw Mr. Rhodes, I identified him.

Q When did you see Mr. Rhodes?

A Today.

Q Is today the first day that you have been able to identify him from sight?

A Me, personally, yes, sir.

Q Did you read the search warrant before you went into the house up in Taos?

A No, sir.

Q Did you participate in the search?

A Yes, sir.

Q How did you know what you were authorized to search [138] if you didn't read the search warrant?

A I'm just trying to think. Agent Rottinger advised us of what would be or should be at the residence, and that's what we searched for.

Q When you first started following the pickup truck in Albuquerque, what information was brought to your attention to focus your attention to the truck?

A That it had picked up ether at the U-Stor-It locker, and we were to follow the truck when we located it.

Q When you say "We," was somebody else with you?

A Other agents were out on surveillance.

Q Who were they?

A Let's see. There was Agent Rottinger, myself, Agent Skow. I believe Agent Biss. I'm not sure. May have been Agent Walker, also.

Q Who was with you in your vehicle?

A No one.

Q Was Richard Espinoza part of the surveillance team?

MR. SMITH: Your Honor, again, we have gone beyond the establishment of any proble cause.

THE COURT: I would agree.

MR. BARGAS: I will withdraw the question. I have nothing further.

THE COURT: Anything further?

* * * *

[143] MICHAEL RONSIEK,

was called as a witness herein by the Defendant Roth, and after having been duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. TWOHIG:

Q Would you give us your name, please?
A Mike Ronsiek.
Q And your occupation?
A I am a salesman.
Q For whom?
A For BWR Scientific, Incorporated.
Q Did you have occasion at some point in early September, 1980, to receive an order at some earlier time, an order for ten canisters, ten five-gallon canisters of anhydrous ether from Carl Muehlenweg?
A Repeat the month again.
Q September, 1980.
A Right. Yes.
Q Approximately when was that order received?
A The order was received about the first week of September. Now, it wasn't received by me, it was received in our office.
Q Did you later receive a phone call from Richard Rottinger in connection with that order?
[144] A Yes, I did.
Q Where were you at the time you received that phone call?
A At the time I ws in the Denver office.
Q Could you describe the phone call to the Court?
A Mr. Rottinger mentioned to me that he had an order placed with us through Graphic Photo Design and there was some problem on that order, that all of it had not arrived in a four- or five-day period of time; wanted me to check on it.

So I went over to the order desk clerk and mentioned to her the information I had. And I asked her what the problem was. She then found that we could get ten five-gallon drums as I remember, out of San Francisco warehouse to complete the order. And I said, "Do it."

And the order was complete at some point in time. It arrived here in Albuquerque, I don't know when.

Q Did Mr. Rottinger, when you went back to the telephone and spoke with him, did he ask anything further of you?

A No.

Q Did he ask you to expedite the order in any way?

A Yes. That's the gist of the conversation. He said, "Can you get this on its way or find out what the problem is?" And I got it on its way.

Q And he indicated when he first contacted you that he had had order placed with you by Graphic Photo Design, [145] is that your testimony?

A Yes.

MR. TWOHIG: Thank you. No further questions.

THE COURT: Anything further, Mr. Smith?

CROSS-EXAMINATION

BY MR. SMITH [Government Counsel]:

Q Mr. Ronsiek, when Mr. Rottinger called you, did he identify himself as to whom he worked for?

A Oh, yes. I knew Dick.

Q Had you worked with Mr. Rottinger before?

A No. I had simply given him a current chemical catalog of the products we sell which include precursors and stuff for—that are used for illicit drugs?

Q You know that Dick Rottinger worked for the D.E.A.?

A Yes, I did.

Q Your contact with him prior to the telephone call was in the context of helping him develop information about precursor chemicals?

A Right.

Q Mr. Ronsiek, can you tell us in your experience with what frequency you get orders for 50 gallons of ether?

MR. TWOHIG: Objection; beyond the scope of direct.

MR. SMITH: I will withdraw the question, Your Honor. Mr. Twohig is correct.

[146] Q When Mr. Rottinger called to inquire about this specific 50-gallon order, did he indicate to you whether the order had been placed on his behalf through someone?

A No. He did mention that it had been placed by Photo Graphics Design and—or Graphic Photo Design, whatever the name of the company is. And I am trying to recall the exact context of the conversation.

"We have a company that placed the order with you. And the name of that company is Photo Graphics Design or Graphic Photo Design. And there has been a problem in that we haven't received it yet. Can you find out where the problem lies?"

And I said, "Sure, I can." So I said, Fine. I will do that. And if there is any problem, I will give you call."

But there were no other problems.

Q I understand. Mr. Ronsiek, one last question:

At the time of the phone call from Agent Rottinger, was the name Carl Muehlenweg associated in your mind with Graphic Photo Design?

A No, it was not. I have never heard of that name.

MR. SMITH: All right. Fine. That's all.

MR. TWOHIG: Nothing further.

THE COURT: You may be permanently excused.

THE WITNESS: Thank you, sir.

* * * *

[DIRECT EXAMINATION OF AGENT ROTTINGER BY RESPONDENT HORTON (Continued)]

[155] MR. SMITH: No objection, Your Honor.

THE COURT: It is admitted.

(Whereupon, Defendants' Exhibit Number 10 was admitted in evidence.)

Q On page four—

THE COURT: Which one is that?

MR. MARCHIONDO: That's the affidavit for the search warrant the 9th day of February, 1981.

Q Going down to the, on the top paragraph to the 12th line, starting with the word "physically," do you see that?

A Not on page four of my affidavit.

Q May I approach the witness? No, it's this one here. It's page four numbered at the top. You can't see the number. Do you see that now?

A Yes, sir.

Q You state in your affidavit "physically surveilling the area, we observed Horton and a female bringing boxes and other items from inside the house and loading these trunks—loading these items in the trunk of a light blue Ford automobile."

Did you make that observation yourself?

A Yes, I did.

Q You say Horton on February the 6th, at the address of 617 Madison, Northeast?

[156] A The individual, the male I thought to be Richard Horton, yes, sir.

Q You thought to be Richard Horton?

A Correct.

Q But, in fact, it was not Richard Horton?

A Subsequently identified as Mr. Rhodes.

Q But in this affidavit you have stated as a fact that "We observed Horton" specifically?

A Correct.

Q As a matter of fact, you knew on February the 6th, that Mr. Horton was in Taos, New Mexico?

A I did not.

Q Did you learn later that he was in Taos, New Mexico, and had been up there since February the 5th?

A Subsequent to his arrest by his admission he had arrived at the laboratory site on Thursday, I believe to be the 5th.

Q Okay. Sir, in any event, on this statement, when you say "We observed Horton," it was another person and not Mr. Horton?

A Correct.

Q Now, going further down in this affidavit, when you got to the third line of the next paragraph, where it states "And this is after the vehicle stopped in Taos," you had been surveilling this vehicle by use of the monitoring [157] of this beeper, is that correct?

A Correct.

Q And you saw this vehicle stopped, I assume, on the highway before the drivers entered the lodge?

A Both vehicles were parked on the road adjacent to the Sagebrush Inn.

Q You saw that?

A Yes, I did.

Q You saw them get out?

A Correct.

Q And you saw the driver, both drivers enter—Was it the Sagebrush Inn?

A I saw both individuals cross the street toward the Sagebrush. I did not see them enter the lodge or the motel area.

Q But the lodge you are talking about is the Sagebrush Inn?

A Correct.

Q And then you state in the next sentence, "Another Caucasian male accompanied Horton." That was not Mr. Horton that you saw leaving the Sagebrush Inn, was it?

A Correct. One of the males at that time, would have been now identified as Gene Rhodes.

Q Which male was it, the one that was Caucasian male that accompanied Horton or would be the person you got described as Horton?

]158] A The individual I described in my affidavit as Horton on this occasion would be Gene Rhodes.

Q Now, did you all leave surveillance at the Sagebrush Inn to see who else might be leaving or entering those premises that day?

A That evening, there were surveillance both at the rural residence, the laboratory site, and the Sagebrush Inn.

Q We were talking yesterday about Mr. Horton's physical condition. Did you observe that Mr. Horton was under the influence of marijuana when you saw him in the morning hours of February the 10th, 1981?

A It was not apparent to me that he was under the influence of any drug.

Q At any time did you state to Mr. Horton that all of the persons in the room were extremely high on high-grade marijuana? Did you not make that statement?

A I did not.

Q Did you not make the statement to Mr. Horton that he looked stoned out of his mind and you knew why, because you had found the grass in the house?

A Negative. There was marijuana found on the table and a quantity in the refrigerator. I never made such a statement.

* * * *

[CROSS-EXAMINATION OF ROTTINGER BY RESPONDENT KARO]:

[165] Q You were not investigating any offenses being committed by Carl Muehlenweg?

A With respect to this investigation, no, sir.

Q Were you investigating any offenses committed by Carl Muehlenweg with respect to any other investigation?

A Yes, sir.

Q What investigation was that?

A There was a search warrant executed at a rental dwelling occupied by Muehlenweg April 25th of 1980.

Q Wasn't that investigation over?

A That investigation is still open, currently.

Q What steps have you taken with respect to that investigation since the time Carl Muehlenweg agreed to become a cooperating witness?

A The package, the investigation was forwarded to the U.S. Attorney's Office for review and hopefully for indictment. The case remains open, disposition pending.

Q In other words, it is open depending on Mr. Muehlenweg's cooperation?

[166] A No. There was a death, a suicide by one of the principals in that investigation. And to my knowledge, the U.S. Attorney's Office has not gone forward with that investigation.

Q Well, let me ask you this: Are you now contemplating proceeding to prosecute Mr. Carl Muehlenweg for anything now?

A I would think not.

Q Were you in August of 1980?

A In August of 1980, it was still an open investigation, whether or not he had been a co-defendant named in the indictment or otherwise, I'm not sure on that.

Q Well, now, you had not had any contact with Mr. Muehlenweg for some period of time prior to your receipt of a telephone call from him with respect to this ether, isn't that correct?

A Once Mr. Muehlenweg was established as a cooperating individual, we have a reporting department within the agency that he be debriefed within 90 days. I believe there was a debriefing of Mr. Muehlenweg.

Q Not with respect to this investigation, with respect to the Logan investigation, isn't that correct?

A Correct.

* * * *

[167] A Correct. This investigation was initiated upon Carl being contacted by James Karo ordering the quantity.

Q Isn't it a fact that Carl Muehlenweg contacted you, you did not contact him, with respect to this ether?

A Initially, yes, sir.

Q And at the time that he contacted you, you were not pursuing any charges against him, isn't that true? Against him, Carl Muehlenweg?

A He was still named in the investigation that was provided to the U.S. Attorney's Office.

Q I understand that his name still appeared on a file and I understand that his name appeared in your office at the U.S. Attorney's Office. What I am asking you is whether you were pursuing an investigation against him?

A No.

Q In fact, his entire contact with your office prior to that time had been with respect to the Logan case, isn't that correct?

A Yes, sir.

Q And the Logan case produced, did it not, for you, nothing other than a controlled purchase of precursor chemicals by Mr. Logan, isn't that correct? Isn't that what you arranged through Mr. Muehlenweg?

A No, that is not so.

Q Did you arrange a purchase of precursor chemicals through [168] Mr. Muehlenweg for Mr. Logan?

A Mr. Logan, Richard Logan, had ordered once again a quantity of chemicals and laboratory glassware through Carl Muehlenweg and Graphic Photo Design. We effected a controlled delivery of those items.

This was subsequent to seizing a laboratory from Mr. Logan here in the city.

Q It was subsequent to seizing the laboratory from Mr. Logan—Mr. Logan's laboratory was seized prior to the execution of the search warrant on Mr. Muehlenweg; correct?

A Correct. March 3, 1980.

Q It was the execution of that search warrant on Mr. Logan's locker that led you to Mr. Muehlenweg?

A Correct.

Q And then Mr. Muehlenweg agreed to cooperate with respect to your arresting and prosecuting Mr. Logan?

A Correct.

Q And Mr. Logan engaged—there was a controlled purchase of precursor chemicals through Mr. Muehlenweg by Mr. Logan, is that correct?

A Correct. Chemicals and glassware.

Q And before he was able to reduce those into some sort of controlled substance, you executed a search warrant on him and that resulted in him killing himself, is that correct?

[169] A No. We attempted to effect an arrest of Mr. Logan and he killed himself on May 17, 1980.

Q Had he converted those controlled purchases, those chemicals in that glassware into controlled substances?

A No, he had not.

Q Now, is that a fairly complete or is that a fairly thorough description of the events surrounding Mr. Muehlenweg's cooperation with respect to Mr. Logan?

A Yes, sir.

Q There was nothing more that Mr. Muehlenweg did for you with respect to Mr. Logan other than what you described in general terms?

A In general terms, yes, sir.

Q So, again, in late August and September of 1980, throughout these applications and affidavits where you are describing Mr. Muehlenweg as an offender, and that you are investigating him as an offender, that isn't true?

A Mr. Muehlenweg was already cooperating.

Q So that's not true?

A Yes, sir.

Q Now, in your application, your first application for an order authorizing the use of an electric beeper as a surveillance aide, you state in the last paragraph, do you not, or does not Mr. Blackmer, "This application is based on the sworn affidavit of Special Agent Richard [170] Rottinger, Drug Enforcement Administration, Department of Justice. Does that appear there?

A Yes.

Q It wasn't based just on that, was it? It was based on that as well as some statements that were made to

Judge Mechem in the course of the presentation of these documents to Judge Mechem, isn't that correct?

A Yes. The first time I was before Judge Mechem, the Assistant, Jim Blackmer and myself, went to Judge Mechem with these applications.

Q And you made statements to him outside these applications?

A Correct.

Q About the nature of the investigation?

A Yes, sir.

Q And those statements contradicted some of the statments in these applications, did they not?

A I don't know whether they contradicted.

Q Well, you told him that Mr. Muehlenweg was a cooperating witness and not an offender, did you not?

A Yes, sir.

Q And you told him that this investigation was not really against Mr. Muehlenweg, it was against others?

A Correct.

Q Isn't that correct. And you knew who those others were, is that correct?

[171] A We had targets at that time, yes, sir.

Q But you didn't put those in the applications. Did you tell Judge Mechem who they were?

A No.

Q Did you tell him you knew who they were?

A No.

Q Now, I'd like you to turn now—

THE COURT: Was that reported? Was a court reporter there?

MR. SMITH: If it please the Court, I think I can respond to that question perhaps better than the witness can. I can represent that it was not, Your Honor.

The representations to Judge Mechem, the Government will represent to this Court, were not made in conformance with the oral warrant provision of the Rule.

THE COURT: Can you consider in this hearing, can anything outside of the four corners of the affidavit be considered?

MR. SMITH: Is the Court seeking a response from the United States?

THE COURT: Yes.

MR SMITH: Yes, Your Honor.

• • • •

[174] THE COURT: If you want us to, you can get Mr. Blackmer and Mr. Rottinger. I just want to know what the position of the Government is.

MR. SMITH: The position is, Your Honor, to have identified Mr. Muehlenweg as a cooperating individual would have put him in jeopardy, and the idea was simply to avoid disclosing the fact, not to avoid disclosing his identity, but to avoid disclosing the fact of his being in a cooperating position.

I am prepared to call Mr. Blackmer and to explore that with Agent Rottinger when the time comes. I have made sure that Mr. Blackmer is available for that purpose.

THE COURT: You mean in a sealed affidavit that's available only to the Court and the—

MR. SMITH: I thought I'd put him on the stand in open court, Your Honor.

THE COURT: No, no. I am talking about Mr. Muehlenweg would be in jeopardy with a sealed affidavit.

MR. SMITH: Your Honor, I can't respond to that. That decision was taken before I became the attorney on the case.

• • • •

[177] Q But it wasn't on any of the laboratory equipment or glassware?

A At his residence, no, sir.

Q Now, turning to the second page of that document, that is your affidavit for the application for the original beeper, you describe—Well, I have asked you about that. Going to the—let's see, second to last paragraph you say,

do you not, "Affiant has verified with Mike Ronsiek, sales representative, BFR Scientific, that Graphic Photo Design, Albuquerque, New Mexico, ordered ten five-gallon cans of anhydrous ether."

Mr. Rottinger, wouldn't someone writing that affidavit get the impression that what you are saying is that you discovered that?

MR. SMITH: Your Honor, I am not trying to frustrate Mr. Boyd's examination. But these are all matters of conjecture.

THE COURT: Yes, Mr. Boyd, you are wasting time. I will read the affidavit and I will determine what an ordinary person reading—I have already got in my mind [178] fixed on that, how someone would read that affidavit.

There is no point in going through it and what did you intend is—

MR. BOYD: All right, Your Honor. I will move to something else.

Q Mr. Rottinger, in any event, when you say you verified with Mike Ronsiek that he had ordered, the ether had been ordered, in fact, you had caused the ether to be ordered, had you not, after Mr. Muehlenweg called you and asked if he should go ahead and do it?

A I knew at that time that Mr. Muehlenweg had ordered—My statement here is that I verified the order with the sales representative.

Q Now—

THE COURT: Who had ordered from Muehlenweg?

THE WITNESS: James Connors Karo.

THE COURT: Is that the only one you knew at that time?

THE WITNESS: Yes, sir.

THE COURT: You knew that he had ordered it from and that's who it was going to eventually—

THE WITNESS: Correct. He had provided quantities in the past to Karo.

MR. BOYD: Your Honor, given the Court's question, I think there is something that needs to be clarified here.

[179] Q At the time that you verified that order with Mr. Mike Ronsiek, you were aware, first of all, of—you had been told by Mr. Muehlenweg, first of all, that Mr. Karo had ordered it, but, second of all, that Mr. Horton and Mr. Harley and the rest of the Defendants in this room were going to be involved in what Mr. Muehlenweg described as a cocaine transaction, isn't that correct?

A In the initial case opening of this investigation, it was understood from Carl Muehlenweg that Karo would acquire ether and then turned it over to Harley and Horton for an extraction process of cocaine.

Q Did he mention any other names?

A I don't recall at that time.

THE COURT: At that time, you knew of Karo, Harley and Horton?

THE WITNESS: I knew of those names, yes, sir.

Q Now, in addition, you knew Mr. Muehlenweg had told you that this investigation on your part would involve cocaine and not amphetamines, isn't that correct?

A Correct.

• • • •

[181] Q Now, turning to again to the second, the first order—I don't think there is a necessity for giving it to you, Mr. Rottinger.

MR. BOYD: Your Honor, we have already commented on the fact that Mr. Muehlenweg is continually referred to as an offender throughout this.

Q Now, let me hand you Governments' Exhibit 6, if I may. That is, is it not, your first renewal for the beeper?

A Yes, sir.

Q Now, again, it starts out as identifying Carl Muehlenweg as an offender, does it not?

A Yes, sir.

Q Now, moving down to paragraph two, numbered paragraph two on the first page, now, when you say "as observed by the affiant," at the end of that paragraph, did you observe Mr—Did you, yourself, observe Mr. Karo pick up the ether?

A On the 20th of September?

Q Yes.

A Yes, sir.

Q Where were you when you observed that?

A I was in several locations. When I first saw Mr. Karo, I believe I was parked south of the Muehlenweg residence.

Q Did you follow Mr. Karo then?

[182] A Yes, sir.

Q Did you follow him to a house?

A Yes, sir.

Q And you then confirmed after that that he had—through the use of beeper, that he had transferred the ether into his house?

A He transported the ether from Muehlenweg's residence in Carl Muehlenweg's vehicle. He later returns that vehicle and the signal is received from the Karo residence, 1108 Monroe.

Q So all you actually saw then was that he picked it up, took it away full and brought it back empty. When I say "full" and "empty," I am referring to the vehicle.

A The vehicle was returned absent the ten five-gallon cans.

Q After that you determined through the use of the beeper that it was in his house, that the ether was in his house?

A I stayed at the 1108 Monroe. When the vehicle left and I determined with the equipment that the signal was coming from that residence.

Q Now, you did not, however, see the ether transferred from 1108 Monroe to its next location, did you?

A I did not.

Q And you were able to determine its next location on Wellesley by following the beeper signal?

[183] A Correct.

Q Now, again, in that package of documents that you have as an exhibit, again, the order sets forth that there is reason to believe that Carl Muehlenweg, Richard Horton and James Karo, are committing offenses, is that correct?

A That's correct.

Q Carl Muehlenweg wasn't committing offenses, and you had known well before that that Richard Horton and James Karo were to be a target of your investigation, did you not?

A Yes, I did.

Q And you knew it before you made the first beeper application?

A In debriefing Carl, yes, I understood that the chemicals would be acquired by Karo and given to other individuals.

Q Now, another thing I wanted to ask you about, Mr. Muehlenweg, is with respect to Government's Exhibit 9, this is the second application for extension of the beeper, is it not?

A This would be the second extension of 90 days, yes, sir.

Q Now, turning to page—Turning to the second page of your affidavit—Now, as to paragraph 6, how did you know that Richard Horton removed the 50 gallons of anhydrous ether from the first U-Stor-It location?

A I was contacted by the resident manager of U-Stor-It for [184] 701.

Q And he told you that?

A Yes. The entry tone alarm had failed to operate.

Q And he told—Had you instructed him before that to let you know if anyone came in or out of that locker?

A Correct.

Q And did he inform you of any other activities around that locker?

A No, he did not.

Q But he did inform you when they took the ether out?

A Subsequent to the removal, yes, sir.

Q Again, in that document, you describe on the first page Carl Muehlenweg as an offender, do you?

A Yes, sir.

THE COURT: I would suggest don't go through the documents. In spite of common perception among lawyers, a judge can read and often does.

Q Okay.

MR. BOYD: Your Honor, I won't belabor anymore language. It's obvious there are a couple more points I do want to bring out.

THE COURT: Save your time. I want to hear some argument, so don't run yourself out of argument time. As I said, we are going to finish this hearing today. * * *

* * * *

[191] Q Through his invoices?

A Through Carl Muehlenweg providing me with invoices, yes, sir.

Q Now, you go in the last paragraph of that—in the last paragraph on that page, there is the statement, "The source advised me that it was personally present when James Karo spoke in the hearing of the above source within the past two months, that Karo was ordering 50 gallons of ether through another person."

Now, that other person was Carl Muehlenweg, wasn't it?

A Correct.

Q So you are saying that the confidential source told you that Karo was ordering through another person, but the other person was the confidential source?

A Yes, sir.

Q Well, so, in other words, that sentence of that paragraph is totally false except for the fact that there was ether being ordered?

A No, it is not false.

Q There was another person?

A There was other persons in the wording here, Carl Muehlenweg.

Q Well, I am not sure I understand, but I will leave that. It goes on after the words "another person," and says, [192] "And would use that ether to extract and purify cocaine. He, Karo, had, or was expecting to arrive."

Now, Mr. Muehlenweg had told you that Mr. Karo wasn't going to have the cocaine, isn't that correct? It was going to be Mr. Horton and Mr. Harley?

A That would do the extraction, yes, sir.

Q And it was going to be their cocaine, isn't that correct?

A Yes. Also that further to that would be two additional purchases of a quantity of ether that Muehlenweg had provided to Karo.

Q But you were aware, were you not, from Mr. Muehlenweg, that Mr. Karo was not being used to pick up the ether and deliver it to Mr. Harley and Mr. Horton, that he wasn't going to extract and purify the cocaine? Didn't you know that from Mr. Muehlenweg?

A Mr. Muehlenweg did not tell me that Mr. Karo would or would not be there. I was informed by Muehlenweg that Harley and Horton were in charge of the extraction.

Q And it was going to be their cocaine, isn't that what he told you?

A Correct.

Q At any time did you think that it was cocaine that he, Karo, had?

A There was a purchase of a quantity of cocaine from Karo, yes, sir.

[193] Q Well, you are not talking about the small quantity of cocaine, you are talking about the use of the 50 gallons of ether, aren't you, here, when you describe Karo's cocaine?

MR. SMITH: Your Honor—

Q Isn't that what you are speaking of?

MR. SMITH: Excuse me. All of this is addressed at the top of the next page, at the top of page three in the affidavit in exhibit seven. I see no purpose in delaying the hearing further exploring it.

MR. BOYD: Well, Your Honor—

THE COURT: I don't either.

Go ahead.

MR. BOYD: I will go on to the next, Your Honor.

THE COURT: You're eating into your argument time by—just outline your facts directly and then I will hear your argument at the end.

Q Now, let me ask you this, at this time, Agent Rottinger, whose idea was it to create the impression in these affidavits that the confidential informant was other than Mr. Muehlenweg and that Mr. Muehlenweg was an offender? Whose idea was that?

A I had worked on the outset—all of these affidavits had been prepared with the assistance of James Blackmer. They were all reviewed by the United States Attorney's [194] Office prior to taking them before Judge Mechem.

Q Now, going along down on page three of your affidavit, starting at the eighth line down, there is a sentence that starts over on the right-hand side of the page, "The source was unable to identify the person."

Do you see that sentence?

A Yes, sir.

Q The source that you are speaking of is Mr. Muehlenweg, then, are you not?

A Correct.

Q "Was unable to identify the person Horton would have placed the order for ether, Carl Muehlenweg." Are you saying the source identified himself?

A Uh-hum.

Q And that you are trying to—you are saying that that increases his reliability as an informant because he is unable to identify Carl Muehlenweg as the source of the ether?

A Whether that further substantiates or corroborates, I am not sure.

* * * *

[196] Q And so were you?

A I was on surveillance, yes, sir.

Q Now, on page five of that affidavit, Agent Rottinger, have you turned to the page?

A Yes, sir.

Q Okay. Thank you. In the first paragraph in paragraph nine, about the middle of the paragraph, there is a sentence that says, "Indeed as shown in attached Exhibit A, laboratory equipment in this present investigation was concealed at another self-storage locker in Albuquerque when it was received pursuant to search warrant in March, 1980." That laboratory glassware wasn't in this present investigation, was it, it was in the Logan investigation?

A It was a separate investigation. Here again, the commonality was that Carl Muehlenweg had ordered that equipment along with this ether.

Q So anything that Carl Muehlenweg is connected with is this investigation?

A The commonality is that Mr. Muehlenweg was involved with both.

* * * *

[199] Q Now, on page four, when you were following the beeper and you followed it to 617 Madison, Northeast, I take it you did not approach the house?

A That's correct.

Q But you determined, did you not, through the use of the beeper that the ether was at that address, at the house?

A The microwave video earlier that day, there were 12 or 13 cans of ether removed on the storage unit, another two different occasions. The ether was placed into the pickup truck. The pickup was followed to Madison. The signal was emanating from the area of Madison address.

Q So in essence, whose ever house that was, you determined that it was located at that property?

A The vehicle was parked off the road in front of that residence, yes, sir.

Q So was it in a driveway?

A I don't know whether it's a driveway. There's no front lawn in the area.

Q It was on the property?

A Correct.

Q And you were able to determine that through the use of the beeper signal?

A The signal was coming from the area of 617.

* * * *

[CROSS-EXAMINATION OF ROTTINGER BY RESPONDENT ROTH]:

[208] THE COURT: Go on. You are getting to the meat of your lawsuit.

MR. TWOHIG: That's right.

THE COURT: I am interested.

Q What did Mr. Blackmer tell Judge Mechem, as best you recall?

A That the reason we were before the federal judge as opposed to the Magistrate was because of the fact that Carl Muehlenweg named in the affidavit was cooperating and his brother was currently a clerk, I believe for the two Magistrates here in this district.

Q Did he tell him anything else?

A I can't recall anything else.

Q That's the full extent of what he told Judge Mechem during the application for the first affidavit, is that correct?

A That's what I can recall, yes, sir.

Q I mean the first beeper installation.

A The very first order, yes, sir.

Q Was anyone else present in the room with Judge Mechem and Mr. Blackmer and you?

A I do not believe his secretary was in the room.

[209] Q And no one else was present as far as you know?

A To my knowledge, no.

Q Was there any inquiry made by Judge Mechem of any kind either to you or Mr. Blackmer?

A Not that I recall.

Q And do I understand then that an order was presented to Judge Mechem, he was told what you said, you swore to the affidavit, you signed it, and he then signed the order that you brought to him?

A Mr. Blackmer told the Judge the reason we were there. The Judge reviewed the affidavits, the paperwork. I then swore to my affidavit.

Q The Judge then signed the order?

A Correct.

Q One other thing. When you were discussing this—all these details with Mr. Blackmer, did you fill him in as completely as you understood the situation to be as to all the facts surrounding Mr. Muehlenweg up to that time before the first application?

A Yes, sir.

Q Am I correct then that the decision as to how to approach Judge Mechem and whether to include these details in your affidavit was Mr. Blackmer's decision rather than your own?

A To include what details?

Q All the details that were in this affidavit?

• • • •

[CROSS-EXAMINATION OF ROTTINGER BY THE GOVERNMENT]:

[216] Q And that is Mr. Muehlenweg's company?

A Correct.

Q Prior to the installation of the entry tone alarm in locker 143, the first storage locker provided for the storage of this ether, had you made any entry at all into locker 143?

A No, sir.

Q Would you tell us, if you can, exactly how the installation of that entry tone alarm was accomplished?

A I assisted an electronic technician, Baxter, from our office, and the entry tone alarm in this case was a button placed within the steel door jamb. It would be on the hinged side of the door. The button was adjustable so when the door was opened more than an inch or two, it was to have initiated an RF signal that we would have received back at the office.

Q RF, initial—

A Radio frequency, as opposed to hard wire. The entry tone alarm was—the button was fitted in storage unit 143 in the steel door jamb. Wires were run through and at the wall of the adjoining storage unit that I had leased from there, and an antenna system was placed on the roof to enable us to transfer the signal from that area back to our office. That was done through the roof of an [217] adjacent storage unit that I had leased.

Q Let me ask you some questions about the purported lapse between the expiration of one beeper order and the entry of a second beeper order on 13 January, 1981.

You have told us that you had installed at that point in time in early November a video surveillance system at the storage locker on Baylor, is that correct?

A That's correct.

Q And that video system allowed you to observe comings and goings in locker 15?

A Locker 15. And other lockers in that same line.

Q How did you receive the transmissions from this video surveillance system, sir, in your office?

A Yes, sir. There is a television console unit in the group supervisor's office. The signal was transmitted from our rented, or our storage unit to the Amfac, back to our building, First National Bank Building, and I could review on a daily basis or review continually the video screen.

Q That went in in early November?

A I believe to the best of my knowledge, early November.

• • • •

[222] Q Agent Rottinger, let me ask you this, if you can recall. Mr. Twohig was examining you with reference to the decision to go to Judge Mechem and present the warrant and the application and the affidavit in a certain form, with certain contents. Let me put the question to you as boldly as I can.

If you can tell us whose idea it was to discuss Mr. Muehlenweg's identity and his function in the way that it was presented to Judge Mechem. Can you tell us whose idea that was? Was it yours, Blackmer's a joint idea?

A James Blackmer had the initial contact with the Magistrate and with Judge Mechem. I was present during the preparation of the paperwork and also in the Judge's chambers.

Q That doesn't quite meet my question. Whose idea was it to set Muehlenweg out in the affidavit without disclosing the fact that he was a cooperating individual?

A James Blackmer.

MR. SMITH: All right. Thank you. I have no other questions of Agent Rottinger, Your Honor.

THE COURT: Anything further? If not, you may step down, sir.

MR. TWOHIG: Your Honor, I anticipate the witness will be a long one.

• • • •

[DIRECT EXAMINATION OF AUSA JAMES BLACKMER BY RESPONDENT ROTH]:

[232] Q So, it's your testimony, then, that the charges would have been pursued, at least a five-year Count, had he not provided the kind of information he did on the Taos operation?

A If he had not worked with and cooperated with law enforcement agents significantly, the Taos operation turned out to be an additional factor that was not part of our agreement, and he came forward on his own and provided us with this additional information and because of that initiative and his assistance, I decided not to proceed with any charges as to Mr. Muehlenweg on the information or the offenses described in these affidavits.

Q Referring you to the Government's Exhibit 5, I would like to ask you to examine it, if you would, please. Do you recognize that?

A Yes, sir, I do.

Q What is it?

A Government's Exhibit 5, the top page is the application for an order authorizing installation and use of a beeper in a can of ether and that's signed by myself.

Underneath it is an affidavit in support of that application and it's signed by U.S. District Judge—I'm sorry, by Richard Rottinger before U.S. District [233] Judge Mechem, and below that, the bottom page is the order authorizing the installation and use of that beeper in a can of ether.

Q Did you prepare any of those documents?

A I'm pretty sure, but I'm not positive I prepared the top page, the application. The wording is something that I recognize, but that's not the typewriter that I ordinarily use. I don't believe I prepared any of the others, but I could have, because I did participate in several of these affidavits.

Q Do you recall what procedure was utilized to prepare these documents before you went up to see Judge Mechem?

A The beeper documents?

Q Yes.

A Either Richard Rottinger and his office typed them and brought them to me for review, or he brought them to my office and I typed them, or occasionally would retype them. In each instance, nevertheless, as to all of these various affidavits, I at least reviewed them, every one in which I was the applicant.

Q As to the specific affidavit that's in Exhibit 5, begins with the second page of Exhibit 5, would you give us your very best recollection as to how that specific document was prepared?

A As I recall, this is the first one of the documents that [234] we sought to put a beeper in a can of ether and I believe it is, because it was late September or early October when we did this. Agent Rottinger gave me a call and I was engaged in other activities, and I talked to him about the recommendation that an order should be obtained, even though there's quite a bit of law that says you really don't need an order to install a beeper in a can of ether, especially before it ever gets to the recipient. But I advised it would be a good idea to take an application and an order to a Judge and have him review and pass upon it and if he felt it was adequate to issue an order.

We discussed how to safeguard the identity of the status of the informant, Karl Muehlenweg, and we reached an agreement, I believe, or at least I made the suggestion that a good way, hopefully, to protect his safety would be to name him straight out rather than to put him in as a confidential informant and then the very details of his information, which was privy to only very, very few people, would then essentially reveal his identity as well as his status as an informant, regardless of the outcome of the beeper and the investigation.

So, we decided there's another reason, also. I also pointed out to Mr. Rottinger that Karl Muehlenweg was a clerk or assistant to Judge McCoy who ordinarily would [235] review this, and we wanted to make sure that Judge McCoy knew that Karl Muehlenweg was involved in this particular case before the Judge, McCoy, was passing upon the validity of the province of his own clerk.

So, I believe, but I'm not positive, that Agent Rottinger or his clerks at the DEA office tied up the affidavit and brought it to me and I either typed the application or had it typed.

Q And you reviewed the affidavit?

A Yes, I did.

Q Let me see if we can discuss for a moment these two reasons for indicating that Mr. Muehlenweg was a participant rather than an informant. That's what you suggested to him, is it not?

A No. I suggested to him that he point out in the affidavit the actual name of Karl Muehlenweg throughout this thing. But not to put in the affidavit his status as an informant, his identity, this fact that he was, in fact, working for the law enforcement office as an informant for at least those two reasons that I just told you.

Q Now, the first reason is to protect his identity?

A No. To protect his status as an informant, because regardless of the outcome of the investigation, assuming that it wound up in a dead end on this beeper thing, nevertheless, if it was unsealed and made available to [236] the various targets, they would not realize, hopefully, that Mr. Muehlenweg was, in fact, cooperating with the agents, they would still hopefully trust him, since we would have a person in there able to monitor possibly criminal activities, whereas if they knew that he was working with law enforcement officers, his usefulness in this case would be zero at least and very likely, in my opinion, his safety or life could be endangered.

Q So, you wanted to, as a result of those, that reasoning, you wanted to have Muehlenweg named in the affidavit in some way that would not identify him as an informant?

A Right. Not reveal his status as an informant, that's correct, a knowing informant for the Government.

Q Did you suggest that the best way to do that would be to have it appear that Mr. Muehlenweg was, in fact, committing the crimes?

A Well, he had been committing the crimes up to the point that he cooperated with us, and wanted to put the truth in there as to those particular facts. We did not want to put too much additional information that we had, which I think would have been—enhanced his probable cause even more in the affidavit, because that would reveal his status as an informant and end his usefulness the instant anyone saw this affidavit, and perhaps his life.

Q Mr. Blackmer, did it occur to you, at all, that it might [237] just be that you were creating the impression in that affidavit in order to get probable cause, that Mr. Muehlenweg was, in fact, not cooperating and was, in fact, a target of an investigation?

A I did not intend to create that impression whatsoever. One of the Judges before whom this would be brought, in fact, this was made specifically known to the Judge each time, this as well as other affidavits were brought to him that Karl Muehlenweg was a cooperating individual.

However, I did not want the Defendants or targets of the investigation, upon seeing the affidavit, to reveal, to realize the true status of Mr. Muehlenweg and end his usefulness to us, if not worse.

Q Did you consider an alternative method of doing that; for example, having the order personally sealed in some way?

A I don't know if that would be possible, permanently sealed. Under the Wiretap Statutes which really don't apply to a beeper, but we use them as kind of a guideline

that at the end of ninety days at the conclusion of an investigation, a Judge must notify the targets, and we felt that there was a strong likelihood that if a Judge issues an order directed toward certain targets within a certain period of time in conclusion of those orders, that these targets would be notified and/or [238] these would be unsealed and made available in public record.

Q Under what statute?

A The Wiretap Statute, because it generally uses a guideline. There's no statute that I know of that pertain to beepers.

Q And you considered that that may apply to beepers?

A No. We used it as a guideline and we felt that very likely as Court practice would be that they would reveal, notify the targets of the issuance of a beeper order or at least unseal it such that it would be made available as public record.

Q Did you operate under the assumption that it was proper to advise a DEA agent to make a false statement under oath for the purposes of concealing the identity of an informant?

A Absolutely not. In fact, we insisted that all statements in the affidavits were totally true. I do know that we had further true information that was not put in there in order to protect the informant's status as an informant, Mr. Muehlenweg's status as an informant. But everything in there was put in there as truthful and I insisted upon it.

Q Is it your understanding that everything stated in that affidavit is true?

[239] A Yes. According to the information that DEA Agent Rottinger gave me, it's all true.

Q Do you think it's misleading?

A Perhaps to the targets of the investigation who would not know all the background information we orally told the Judge. But we do not think it's misleading as to the Judge; one, because it's true, and two, because the Judge was specifically advised on each occasion that Karl

Muehlenweg was, in fact, working with us as a confidential source.

Q You agree with me, do you not, Mr. Blackmer, that if all the information pointed out in this affidavit that Karl Muehlenweg was a target was eliminated, everything that would indicate that Karl Muehlenweg was a target was eliminated, and everything that goes toward probable cause related to Karl Muehlenweg being a target was eliminated, there would be no probable cause in that affidavit?

A If probable cause is even required for a beeper affidavit, you're probably right. I haven't looked through this word for word. It would delete a great deal of this affidavit.

Q But you have certainly gone over that in preparation for testifying here today, have you not?

A I have not. I haven't seen these affidavits, outside of [240] seeing them in general, like on a person's desk for the past several months.

Q Were you aware when you applied for this affidavit that in the absence of the information we are speaking of, there would not be probable cause as far as this document was concerned?

A Absent the information that you just described?

Q Yes, sir.

A In the affidavit, yes, although there would be enough information from other sources that I think could have been put in there. However, we were not at all convinced an order was even required, but we decided to seek one out of an abundance of caution and to protect not only the right of the various targets, but also because of the DEA.

Q I understand, sir. Now, had Karl Muehlenweg been an informant and a cooperating individual for DEA since May 20th, 1980?

A It was approximately that time. It was shortly after the execution of the Search Warrant at his resi-

dence and at T and M Company. I don't know an exact date, however, but for sure, late in the spring of 1980, through February of this year, at least, he was a co-operating informant.

Q Did you have sufficient information upon which to make [241] a determination as to whether an allegation in an affidavit could be made that he was a reliable informant?

A Yes, sir. You mean, without revealing his name?

Q Yes.

A Yes, sir.

Q And you thought that such information might exist, is that correct?

A I knew that it did exist, at least according to Agent Rottinger.

Q Then, it's your testimony that usually there's an alternative method of obtaining probable cause and you chose not to use it?

A That's right. There is an alternative method of showing probable cause; and furthermore, there is another method to show even a further probable cause. That is credibility of the informant besides naming him in the affidavit.

Q In other words, you could have submitted an affidavit to the Court as is truly the practice in drug cases saying there's a confidential unnamed informant, that he's provided the following information, and upon the basis of that, gotten this order?

A That would be one way to do it, also, or a combination of the two, naming him as well as appointing out he was working as a confidential informant and showing his [242] background for liability.

Q Now, you said that there were two reasons for doing it this way. The first reason involved protecting the identity and the usefulness of the informant?

A Protecting the status of him as an informant and his usefulness in this case, and hopefully others, too.

Q And the second reason involved something concerning his brother. I didn't quite understand that. Could you clarify that?

A Yes. His brother, Mr. Muehlenweg's brother, at that time was working for Judge McCoy, the Magistrate who ordinarily issues these Search Warrants and beeper orders. We wanted to make absolutely sure that Judge McCoy knew that Karl Muehlenweg was involved in this case before he, Judge McCoy, was passing upon essentially his own clerk's brother and his reliability or accuracy.

Q Did you take this affidavit to Judge McCoy?

A I did, yes, personally, and advised him of the fact that Karl Muehlenweg in this case was actually working now as the confidential source for the United States, the DEA.

Q Did you ask Judge McCoy to issue the Search Warrant?

A Well, I brought it to him first to see what he wanted to do with it, being that Karl Muehlenweg was the brother of Judge McCoy's clerk.

* * * *

[246] Q When you went in Judge Mechem's chambers, did you sit down?

A Yes.

Q Both of you?

A Both of us did.

Q What occurred after you sat down?

A Well, at that point, immediately upon handing this to Judge Mechem, I explained why we were coming to a District Judge instead of a Magistrate.

Q What did you say?

A It was primarily that Karl Muehlenweg was the brother of the Magistrate's clerk. And I also advised Judge Mechem in detail that Karl Muehlenweg was working with the United States Drug Enforcement Administration as a confidential source or an informant, but we

didn't want to put that in the affidavit itself because this would reveal his status and end his usefulness to us, regardless of the outcome of this investigation.

Q Before you said that, did you raise your right hand and swear to tell the truth?

A No, sir, I did not.

Q You were not sworn?

A No, I was not.

[247] Q These are unsworn statements?

A That is correct.

Q Why did you do that as an unsworn statement?

A Well, I wanted to make sure that Judge Mechem knew two things; one—or three things, really—one, why we were coming to him with a beeper order instead of the Magistrate; two, that the Magistrate had asked us to take it to Judge Mechem because Karl Muehlenweg's brother was a Magistrate's clerk; and three, to make absolutely sure that Judge Mechem was not misled in any way by the fact that Karl Muehlenweg in the affidavit, although named, was actually working as a cooperating individual for the law enforcement offices.

Q Did you suggest to Judge Mechem that before you began speaking to him that possibly a Court Reporter should be summoned?

A No, I did not.

Q Did you in any way make an affidavit and submit it to Judge Mechem—

A About that?

Q —so he would have some written record, so we would all have some written record of what occurred there?

A No, I did not.

Q Why?

A Well, if I did that, then again, this would be filed [248] with the affidavit application here and it would become a public record upon the unsealing of this or upon notification of these various persons and their success in unsealing it, which would again do exactly the

same thing we were trying to avoid; that is, identify Mr. Muehlenweg as a Government informant and end his usefulness in this investigation, if not worse. Plus Judge Mechem, of course, did not ask me to make that, although I certainly would have been willing to if he had asked or ordered it.

Q Did you, at each subsequent time that you spoke to Judge Mechem for further extensions or further applications, speak to him off the record?

A I don't know about off the record. I didn't say off the record. We just told him there in his chambers that this is the same Karl Muehlenweg, it is the same investigation and the same beeper order concerning the cans of ether and that he was still working, the Karl Muehlenweg was still working with the DEA as a confidential source throughout all these affidavits. However, no record was made, if that is what you mean.

Q There was no record made and none of those statements were on the record?

A None of the statements by me were under oath and no stenographic record or tape recording was made, to my [249] knowledge.

Q For what reason?

A The same reason; that is, we didn't want to put the affidavit or the record in there as part of this affidavit, which if it was ever revealed to any of the targets after notification to them, even if the investigation went nowhere, they would identify and realize Mr. Muehlenweg was a confidential source and end his usefulness to DEA, if not worse.

Q Mr. Blackmer, we have spent about two hours here this morning, painstakingly going through each of the affidavits, each of the sworn statements of Mr. Rottinger dealing with a variety of apparent misrepresentations and inconsistencies. I don't want to take all that time with you, but let me ask you this question as to those in general.

A Yes.

Q Were there misrepresentations and inconsistencies contained in those documents which you drafted or helped draft, which were for the same purposes, essentially, as you have set out here?

A I haven't looked through these things word for word to see if there is any inconsistencies in there. I would tend to doubt that there are, but the documents speak for themselves.

* * * *

[257] Q But as far as the knowledge that you actually had, would I be correct in saying that you knew that there really was no connection with the earlier Muehlenweg-Logan proposition, the one that's in exhibits, the exhibits I just showed you, the Defendants' exhibits and beeper application, except for the fact that Muehlenweg was your informant?

A No, I would not say that that is accurate. Ether is also used for, in the manufacturing of amphetamines. However, as I understand it, for the most part, Mr. Muehlenweg was providing information tending to show that this ether, or at least a large part of it, was intended for use to synthesize cocaine out of fabric, and not for— [258] he didn't mention that it was not for amphetamines, but he didn't go into detail on that. But he had no way of controlling exactly what it was to be used for. He was the purchaser for the ultimate users and it's used for those two purposes, especially in the manufacturing of amphetamines.

Q Mr. Rottinger didn't tell you that Muehlenweg said this was going to be used for cocaine?

A He told me that Mr. Muehlenweg's information was that it was intended for use, at least in part, for cocaine.

Q Let me show you a couple more items before I finish up here.

Let me show you a copy of the affidavit for the Search Warrants in Taos, Mr. Blackmer, which is in evidence,

Exhibit 10, Government's Exhibit 10, where it's marked 4 and 5—excuse me, I can show you that better with the exhibits.

Could you read the paragraph I've indicated to you, to yourself, where it says, "There's a reliable confidential informant"?

A Just to the end of the page?

Q Yes, sir. Now, that is information that is in the affidavit for the Search Warrant on the Taos house, which refers to a confidential informant.

A That's correct.

• • • •

[CROSS-EXAMINATION OF BLACKMER BY GOVERNMENT]

[265] Q And in your own best professional judgment, the alternative you chose was the best one consistent with security in the investigation and consistent with the candor required of application for Federal Court Orders?

A Both. I would like to have put on even more facts and information showing his reliability, but we could not do so without revealing his identity and end his usefulness in this investigation, if not worse.

Q Are you still of some concern, now, with the events having taken place, are you still of some concern about the possibility that such applications might become public record through one device or another?

A Definitely. In every case, in fact, I assume that it's going to become public record at some point, either through a Freedom of Information Act request by somebody or after notification that an Order has been entered or in connection with a prosecution, as one of these investigations turns out to be successful.

Q I want to leave no misimpression or suggestion to the contrary, Mr. Blackmer. You have uttterly no reason to believe, either through laxness or otherwise, that any-

one in the Court offices might inadvertently let these things become public, that's not a genuine concern?

A Not a genuine concern, but it can happen, something [266] could be unsealed or somebody, maybe for dishonest purposes, goes in and takes off the—

Q But you have no reason at all to suspect that in this case, do you?

A No, not in this case, and not in general in this Federal Court.

Q All right. I wanted to make that clear, Mr. Blackmer.

Can you tell us whether, when you obtained the Search Warrant for Meadowind, itself, Exhibit 10 and its attachments, whether there were any oral representations to the issuing Magistrate?

A Not that I know of, but I wasn't at the Magistrate when Mr. Rottinger took that there.

Q None were made by you, in any event?

A That's correct. I didn't call the Magistrate, or anything. In this affidavit, by the way, for the Search Warrant, we can talk about a confidential informant in that case because there are three or four people that had the information that Muehlenweg had and that would tend to protect him there, like calling him a confidential source. But if we named him only and didn't name some of the other people that were in there, that right away would focus suspicion on him.

MR. SMITH: All right. Thank you. I have no further questions of Mr. Blackmer.

* * * *

[275] THE COURT: All right. Fine.

MR. SMITH: Your Honor, with reference to Mr. Muehlenweg, he has not, as I understand it, been subpoenaed to the hearing. I've been in touch with him telling him to be ready on a half hour's notice to get from where he is down here. I didn't know until now that defense wanted to call him. I can have him here in a half an hour. I'll have to make a phone call.

MR. TWOHIG: Your Honor, if I may indicate this: I think Mr. Smith will agree, he said when we first started our discussions of the proceedings as to these Motions, he said he would have Mr. Muehlenweg available and we have relied on that. We could take another witness.

THE COURT: Let's not get into an argument on that. He'll be here. Call another witness.

MR. MARCHIONDO: Call Mr. Horton.

THE COURT: Come forward.

RICHARD M. HORTON

was called as a witness herein on his own behalf, and after having been duly sworn, testified upon his oath as follows; [276] to-wit:

DIRECT EXAMINATION

BY MR. MARCHIONDO:

Q Mr. Horton, would you please state your name, please?

A Yes, sir. Richard M. Horton.

Q And you live here in Albuquerque?

A Yes.

Q Mr. Horton, were you in Albuquerque on February the 6th, 1981?

A No, sir.

Q Where were you?

A I was in Taos Ski Valley.

Q And when did you arrive in Taos Ski Valley?

A I believe it was on a Thursday afternoon on February the 5th, the day before that.

Q Now, do you remember your arrest on February the 10th, 1981, in the early morning hours?

A Yes, sir.

Q Would you tell the Court whether or not before the police entered the Taos residence, if you had engaged in the smoking of any type of narcotics?

A Yes, sir. We had been smoking marijuana.

Q And you say "we." Who was doing that?

A The four individuals, me and the other three individuals in the house.

* * * *

AFTERNOON SESSION

[287] The Hearing on Motions was continued on the 12th day of May, 1981, at 1:30 o'clock P.M., as follows:

THE COURT: Call your next witness.

MR. MARCHIONDO: Before we do that, may I state to the Court, Mr. Twohig and I want to make sure that all of the Defendants receive the benefits of thorough investigation in this matter, and after hearing the testimony of Mr. Rottinger and Mr. Blackmer, conferred with Judge Mechem in the last three or four minutes, and inquired of him what he recalled about this particular matter. He does remember bringing in the affidavits. He does remember some discussion, and when asked the question if he was told that the person named in the affidavit was also a confidential informant, he said he does not remember that. When asked if he merely confined himself to the four corners of the affidavit, he stated yes.

We don't know precisely—we don't want to—if it is proper to call a Federal Judge, we don't like to call a Federal Judge.

THE COURT: I was going to ask if any of you had enough nerve to try that.

MR. MARCHIONDO: I cross-examined a Federal Judge in California in a civil case, Judge, and that was tough.

THE COURT: You may try if you want. I won't issue any subpoena.

* * * *

[DIRECT EXAMINATION OF RESPONDENT HARLEY]:

[299] A Yes, sir.

Q And who leased the premises?

A Michael Steele.

Q And do you know how much it was that the rent was to be paid monthly on?

A It was $450.

Q Did you pay for the rent, or at least a portion of the rent on that house in Taos?

A Yes, sir.

Q And, Mr. Harley, did you have a key to the premises?

A Yes, sir.

Q And, Mr. Harley, did there come a time after your arrest in Taos, New Mexico, whereby you had a conversation with the landlady?

A Yes, sir, I did.

Q Did there come a time after your arrest and after your conversation with the landlady, that something transpired with reference to a refund?

A Yes, sir. She gave me back a check for $450 in my name.

Q And gave it back to you?

A To me, yes.

Q In your name?

A In my name.

Q Now, do you know what that $450 was for?

A That was for the last month's rent.

[300] Q You were talking about the last month's rent. Had the month of February of 1981 been paid?

A Right, it had. This was for the month of March.

Q Now, I want to direct your attention back to the day on or about August of 1980, the latter part of that month. Did there come a time when you were interested in purchasing some ether?

A Yes, sir.

Q And in reference to that, what did you do by way of acquiring this ether?

A I gave a thousand dollars to James Karo.

Q Who else did?

A Richard Horton did.

Q And you gave a thousand and Richard Horton gave a thousand. Did Karo put up any money?

A I believe he did put up another thousand.

Q And in reference to that, was this for the purchase of that ether that we are talking about?

A Yes.

Q And it is the subject of this case?

A Yes, sir.

Q Did there come a time after the ether was acquired, Mr. Harley, that it was later transferred to certain lockers?

A Yes, sir.

[301] Q I want to talk to you, first of all, about the locker designated as 143. Who rented that locker?

A Richard and I did, but it was under Richard's name.

Q Did you pay the rent for that locker?

A Yes. We split it on and off.

Q Did you have a key to that locker?

A Yes.

Q Did there ever come a time during the time that you leased locker 143, that you would go to the area of the locker?

A Yes, we periodically went to check on everything.

Q All right. Now, I want to talk to you about locker 15 there at the U-Stor-It. Who leased that locker?

A Richard also leased that.

Q Did you have anything to do with that locker?

A Yes. I helped pay rent on that, also.

Q Do you recall how much rent was paid and when it was last paid?

A I paid $120 in, I believe, October of '80 for six months' rent.

Q And did there come a time when you would check by locker 15?

A Yes, periodically, we would go by and check on the contents.

Q Now, with reference to that house, let me ask you one [302] further question. With reference to the house there in Taos, other than you and Steel, was there somebody else that was also contributing to the rent there?

A Yes. Mr. Horton was.

MR. ABRAHAM: Pass the witness, Your Honor.

CROSS-EXAMINATION

BY MR. SMITH [Government Counsel]:

Q Mr. Harley, you and Mr. Horton rented locker 143 together, is that correct?

A Yes, sir.

Q And Mr. Horton was the one that signed off on the lease agreement?

A Yes, sir.

Q You and he shared the rental obligations?

A Yes.

Q Was it always you or always he that took the money over and made the payments?

A It was always him.

Q Was there ever an occasion where somebody other than one or the other of you did it, to your knowledge?

A Not to my knowledge.

Q You have told us that you likewise were at least interested in locker number 15, I think, Mr. Baylor, isn't that where the second locker was?

A Yes, sir.

[303] Q Were you present when the lease arrangements for locker number 15 were made, sir?

A No, I wasn't.

Q How do you know then, sir, who it was that signed up to be the lessee of that locker?

A Just by my association with Mr. Horton.

Q Mr. Horton told you that, is that correct?

A Right.

Q Did you ever hear that a man named Peter Anlian, A-n-l-i-a-n, was the record lessee of locker number 15?

A No.

Q Do you know Mr. Anlian?

A No, sir.

Q Do you know anyone named Anlian?

A Yes, but not a Peter.

Q Dolly?

A Yes, sir.

Q And she is Mr. Horton's girl friend?

A Yes, sir.

MR. SMITH: Thank you. No other questions, Your Honor.

THE COURT: Anything further?

MR. ABRAHAM: Your Honor, I want to clear up two items.

* * * *

[DIRECT EXAMINATION OF RESPONDENT STEELE]:

[305] Q Where did you live in February of 1981?

A Taos.

Q Is that the Meadow Inn referred to as a Meadow Inn?

A Yes, sir.

Q In February of 1981, how long had you lived there?

A Since approximately November 1st.

Q With Mr. Harley?

A Harley, yes.

Q Had you entered a lease on that house?

A Yes, sir.

Q Did you maintain personal belongings, private possessions, papers, this type of thing, at that house?

A Yes, sir.

Q Did you customarily live and sleep and eat at that house?

A Yes, sir.

Q Were you—was that the situation as it existed on February 6th, 7th, 8th, 9th and 10th?

A Yes.

Q The period of time immediately preceding your arrest?

A That's correct.

Q Were you present at the house on February 10th when a warrant was executed?

A Yes.

Q Were you arrested at that time?

A Yes, sir.

[306] Q Did you have an expectation of privacy regarding the contents of that house that you maintained as your residence?

A Yes, I did.

MR. BEAM: No further questions.

MR. SMITH: I have no questions of Mr. Steele, Your Honor.

THE COURT: You may step down.

(Witness excused.)

MR. BOYD: I will call Carl Muehlenweg very briefly, Your Honor. I will limit it to matters—

THE COURT: That's all right if you have got anything new, but if there is something that's been established and there is no controversy about it, just let it go.

CARL MUEHLENWEG,

was called as a witness herein by the Defendant Karo, and after having been duly sworn, testified upon his oath as follows, to-wit:

BY MR. BOYD:

Q Would you please state your name and address, please?

A Carl Muehlenweg, 1423 Fruit, Northwest.

Q Mr. Muehlenweg, I will try to be brief. During the year 1980, starting from sometime during April, and [307] proceeding through the end of that year, you had an understanding with the agents of the Drug Enforcement Administration with respect to your participating in a couple of investigations with them, did you not?

A Yes, I did.

Q And the first such investigation involved a Mr. Logan, is that correct.

A Correct.

Q Now, Mr. Logan was the object to turn—Mr. Logan had been the object of a search warrant prior to a warrant being executed on you, is that correct?

A That's correct.

Q And he had had laboratory equipment with your name or your company's name on it seized from him?

A That's correct.

Q And the D.E.A. told you, did they not, that that's how they found out about you?

A Yes.

THE COURT: I had better, just for the record, Mr. Walker, you are Mr. Muehlenweg's attorney and—

MR. WALKER: Yes, Your Honor.

THE COURT: And if you want to consult with Mr. Walker at any time about any question, the answer to which you feel might incriminate you, please do so. And if you want to anytime decline to answer on the [308] grounds of your Fifth Amendment privilege, you may do so.

THE WITNESS: Yes, sir.

THE COURT: Any answers you give might, of course, be used in prosecution against you if they did incriminate you.

THE WITNESS: Yes, sir.

THE COURT: So if you want to be up here with your client, Mr. Walker, that's all right. If you want to stay where you are—

MR. WALKER: I think we have tried to talk out any potential problems in that regard.

THE COURT: If you have got any problems, just stand up, or if you have any questions, consult your attorney, Mr. Muehlenweg.

THE WITNESS: Yes, sir.

Q (By Mr. Boyd) Mr. Muehlenweg, with respect to the Logan investigation, isn't it correct to say that what you did for the D.E.A. in that case was to inform the D.E.A. that Mr. Logan had ordered laboratory—certain laboratory equipment and chemicals from you, and that you would inform them when the chemicals came in and tell them when they were delivered to Mr. Logan? Is that correct?

A That's correct.

[309] Q And pursuant to that understanding, you did so inform them—

A Yes, I did.

Q —when those chemicals came in? None of those chemicals were controlled substances in and of themselves, were they?

A I don't believe so.

Q They weren't drugs?

A No, they weren't drugs. They were chemicals.

Q And laboratory equipment?

A Yes.

Q Now, you did, in fact, inform the D.E.A. of his order and the fact that he picked them up, and subsequent to that, isn't it correct that you were informed by the D.E.A. that they had executed a warrant, a search warrant or arrest warrant on Mr. Logan, following your delivery to him of those chemicals and that equipment?

A That's essentially what happened. Not necessarily in that order.

Q The result of the Logan investigation, to your knowledge, from the D.E.A., was that they executed—they confronted Mr. Logan and that he fled and killed himself in an automobile, isn't that correct?

A My understanding was that he followed—the D.E.A. followed Mr. Logan from my premises after obtaining [310] certain chemicals and laboratory equipment, and then after following him around for a period of time, did try to execute arrest on him. At which time, he did kill himself.

Q Now, and what they were able to seize pursuant to that effort on their part, from his vehicle, was laboratory equipment and chemicals?

A Yes.

Q They never informed you that they had seized any controlled substances from him then or later, or from any premises owned by him?

A Not from him directly, no.

Q Now, that was the sum total of information or assistance that you had supplied the D.E.A. before you informed them of the 50 gallons of ether which is at issue in this case, isn't that correct?

A At some time during the Logan investigation, I informed them that I had, in fact, previously had delivered to some other people some chemicals, namely, ether.

Q And that was the people involved in this investigation, is that correct?

A That's correct.

Q Who did you name as being involved in this investigation?

A James Karo.

• • • •

[314] [DIRECT EXAMINATION OF DEFENDANT RHODES]:

BY MR. BARGAS:

Q Would you state your name for the record, please?
A Gene Rhodes.
Q What is your present address, Mr. Rhodes?
A 617 Madison, Northeast.
Q And were you living at that address on February the 6th of this year?
A Yes, I was.
Q On that same date, did you have the opportunity to open up a locker that has been described as locker number 15 at a U-Store-It unit?
A Yes, I did.
Q Was that storage unit locked when you first approached it?
A Yes, it was with a Master padlock.
Q And did you have a key to that padlock?
A Yes, I did.
Q And did you open it?
A Yes.
Q And did you enter it?
A Yes.
Q Where did you obtain that key?
A From Richard Horton.

• • • •

[319] THE COURT: You have given him your advice. If you are asking me for a rule, you will get none one way or the other. You are Mr. Karo's attorney, and you give him your advice.

MR. TWOHIG: Your Honor, the thing is, the other Defendants have a right to establish as much as possible, the basis for a Severence Motion here, and this testimony is relevant to it. It is my understanding that the testimony—

THE COURT: You can seek to put on Mr. Karo. But Mr. Boyd's client, I assume he will abide by Mr. Boyd's advice.

MR. BOYD: Well, Your Honor, may I have a brief recess, then, with my client?

THE COURT: Yes. Is there anything else besides that?

MR. TWOHIG: No, other than Mr. Karo and the severance question, Your Honor, we have no other testimony at this time.

May I address the Court with respect to one issue [320] that relates to testimony, and make clear our position? Mr. Marchiondo spoke to Your Honor earlier with respect to a meeting we had with Judge Mechem, and the Court indicated it would be inappropriate to call Judge Mechem as a witness. We concur that it might seem inappropriate, we would make as an offer of proof what Judge Mechem would testify to for the record is what Mr. Marchiondo represented, and we would ask leave to call Judge Mechem.

THE COURT: Are you serious you want to issue a subpoena and call Judge Mechem?

MR. TWOHIG: Your Honor, I would not feel a subpoena would be necessary for Judge Mechem to testify here. I'm sure he would do so voluntarily if we requested it. I feel this way, that we are in a position where the government has, through their witnesses, through witnesses we have put on as adverse witnesses under cross-examination, given a version of events which occurred before Judge Mechem, and they are asking this Court to conclude that Judge Mechem relied upon things that he did not rely upon.

Now, either that testimony should be considered solely for the purpose of showing some kind of an intent, and the ruling of the Court should be that we don't call Judge Mechem, that we don't make an offer of proof, [321] that we don't present his testimony in any way, and that none of that information will even be considered in ruling upon

this motion and this suppression hearing, or we should be permitted to call Judge Mechem.

THE COURT: Well—

MR. TWOHIG: That's the difficulty with the procedure they have used. They have put this Court in that position. We haven't.

THE COURT: Yes, I know where the Court is. I understand fully. You don't need to help me out on that, Mr. Twohig. One place I'm not, is in a position of passing on the credibility of a colleague. That is not going to happen. So—

MR. TWOHIG: Very well, Your Honor.

MR. BOYD: Your Honor, I would also like to state for the record that I believe my client would have relevant testimony to give on the issue of severance, but under the circumstances, I guess I'm going to instruct him to take the Fifth, and I will not allow Mr. Twohig to call him.

THE COURT: Mr. Smith, are you going to have any evidence? That's all the evidence for the Movants on this matter.

MR. SMITH: No, Your Honor.

• • • •

[331] THE COURT: Thank you very much, counsel. We do have a very unfortunate situation, not the least of which is that the confidence of the Court and the affidavits that might be presented to it, I would say, is shaken, at a minimum. I will just—the Motion to Suppress will be granted and I will give you my reasons why.

Well, a chance to make some law in the Tenth Circuit on various points here, if you want. First of all, as to whether a warrant is needed for a beeper under these circumstances, there is, of course, a split in the circuits on that issue. It has been my feeling straight along, that a beeper is an intrusion; it's a search. It should require a warrant. Government agencies should not be free to just implant them at will. It should come through the normal Fourth-Amendment warrant probable-cause proc-

ess. And I would say very particularly, so I realize that one circuit, I think the Ninth or somebody—I think the Ninth, saying that it is not an intrusion because it does no more than track something that you could track with the eye, where you plant a beeper in a vehicle or something like that, that it could be followed. Well, five months—you can't—it's not possible to follow around for five months. That's what happened here as a result of having that beeper in there for five months. All told, I think a [332] warrant for a beeper, under these circumstances, was required.

As far as the affidavit, I will say possibly there are not too many outright blatant falsehoods, but as a result of half-truths, innuendos, deliberate attempt to create an impression other than the actual fact, my view is that the original affidavit, as putting it bluntly, is as phony as a three-dollar bill. And then you have not only that, that it was deliberately conceived to give a false impression, and I might add, a good job was done in that regard. Reading of that affidavit, you come out with a far different impression of the facts than the actual truth.

Now, as to—I don't know that it would make any difference whether or not the affiant or the U.S. Attorney supplied additional information to a Magistrate issuing the affidavit or issuing the warrant, that is a Judge in this case, but under any circumstances, you have a flat conflict in the evidence between the D.E.A. agent and the U.S. Attorney, as to whether or not the Judge was told anything outside of the affidavit. Since the government created that situation, that conflict, it's easy to resolve, it goes against the government. I find that the Judge was not told anything outside of the affidavit, if that is material.

[333] Now, I think the law is clear as far as the probable cause, you can't go outside of the affidavit, the sworn testimony. Just as far as what's right and what's wrong, it presents a terrible situation the government has done and created here.

Now, as far as standing, in my view, the installation of a beeper is a continuing search. It's not just a search when it's put on the can on the loading dock, or wherever, it's a search wherever that can is tracing. And that's the purpose of the whole thing, is to—and as is evident in this case, it did a good job. I say, accordingly, I think each person has standing, has demonstrated standing to challenge, except maybe the Defendant Roth is the only one I have a question about in that regard. Everyone else has demonstrated some connection with, or expectation of privacy where the can was intruded. Some have demonstrated ownership or possession of it. But rather than further complicate the situation, I will just grant the motion to suppress as to all the Defendants.

Now, as to the fact that there might have been additional probable cause developed and shown as the matter went along, that might be so. But I don't think you can cure the ill if it hadn't been for the faulty [334] beginning, it would have lost track of the whole thing right at the start, and the fact that they subsequenly developed probable cause, I think, is just a product of the initial improper affidavit and deception of the Court.

Now, in granting the Motion to Suppress, let me—I will just add another thing. I take no—I think there is a great deal to be said for the Chief Justice's view that suppression is not necessarily the answer where the law officials do something improper. The Chief Justice's view that perhaps other solutions such as lawsuits, disciplinary action or other matters are more appropriate where perfectly reliable evidence is developed and then has to be suppressed because of something that has been done wrong, either deliberately or inadvertently by the law officials. Unfortunately, this was done wrong, deliberately. Whether they though they were doing wrong or not, they were. Perhaps one of these days the Chief Justice's view will prevail and will not be necessary to suppress reliable evidence because of the errors in mal-

feasance of the law enforcement officials. Those will be my findings and conclusions. And the order of the Court, the evidence seized at the—all of the evidence seized at the search of the house in Taos, will be suppressed. * * *

* * * *

SUPREME COURT OF THE UNITED STATES

No. 83-850

UNITED STATES, PETITIONER

*v.*

JAMES CONNORS KARO, ET AL.

ORDER ALLOWING CERTIORARI

Filed January 16, 1984.

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Tenth Circuit* is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 434372 280

Office Supreme Court, U.S.
FILED
DEC 29 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-850

In The
# Supreme Court of the United States
October Term, 1983

UNITED STATES OF AMERICA,

*Petitioner,*

vs.

JAMES CONNORS KARO, EVAN ROTH, MICHAEL GAYLORD STEELE, RICHARD MILES HORTON, and WILLIAM ROBERTSON HARLEY,

*Respondents.*

## ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## BRIEF IN OPPOSITION OF RESPONDENTS KARO, ROTH AND STEELE

NANCY HOLLANDER
FREEDMAN, BOYD & DANIELS, P.A.
20 First Plaza, Suite 212
Albuquerque, NM 87102
(505) 842-9960
*Counsel for Respondent Karo*

REBER BOULT
1412 Lomas Blvd., NW
Albuquerque, NM 87102
(505) 842-0392
*Counsel for Respondent Roth*

JAMES BEAM
715 Tijeras, NW
Albuqerque, NM 87102
(505) 842-5924
*Counsel for Respondent Steele*

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

## QUESTIONS PRESENTED

The government's petition states the questions presented more favorably to the government's position than the facts and the Court of Appeals' holding would warrant. The following is a more accurate statement of the issues:

1. When government agents install a beeper in merchandise without a search warrant, at a time when the merchandise is possessed by a government agent but in transit to a defendant, does a fourth amendment-cognizable intrusion take place when the defendant takes possession of the merchandise? *United States v. Karo*, 710 F. 2d 1433, 1437 (10th Cir. 1983); Petition 6a[1]

2. Is "warrantless use of a beeper to monitor the location of a non-contraband withdrawn from public view inside private residences or similarly situated places . . . an unconstitutional search or seizure"? 710 F. 2d at 1439; Petition 10a.

---

[1]By so stating the issue, respondents do not abandon their contention that this issue was dealt with only in dictum and therefore is not properly presented for review here.

## TABLE OF CONTENTS


Page

Opinions Below ..... 1

Facts ..... 2

Reasons for Denying the Writ

Point I: It is inappropriate for this Court to consider beeper issues so soon after *United States v. Knotts.* ..... 3

Point II: There is not now a clear conflict among the circuits. ..... 4

Point III: The Court of Appeals' decision rests soundly on established principles of expectation of privacy in the home..... 5

Point IV: A ruling justifying warrantless installation of a beeper would not change the result reached in this case. ..... 8

Point V: Infringement of Karo's fourth amendment rights began at the time the ether came into his possession. ..... 8

Point VI: The Petition for certiorari was not timely filed. ..... 9

Point VII: The government's contentions are not ripe for Supreme Court review. ..... 11

Appendix ..... 1A


## TABLE OF AUTHORITIES

CASES:


*Arkansas v. Sanders*, 442 U.S. 753 (1979) ..... 11

*Cardwell v. Lewis*, 417 U.S. 583 (1974) ..... 7

*Hester v. United States*, 265 U.S. 57 (1924) ..... 5, 7

*Payton v. New York*, 445 U.S. 573 (1980) ..... 6

TABLE OF AUTHORITIES—Continued

Page

*Robbins v. California*, 453 U. S. 420 (1981) ..... 6

*United States v. Butts*, 710 F. 2d 1139 (5th Cir.), *reh. en banc granted*, No. 82-1260 (Oct. 25, 1983) ..... 4, 5

*United States v. Cassity*, No. 81-1565 (6th Cir. 1983) (Available Dec. 7, 1983, on LEXIS, Genfed Library, Cir file) ..... 4, 5, 7

*United States v. Clayborne*, 584 F. 2d 346 (10th Cir. 1978) ..... 9

*United States v. Cortina*, 630 F. 2d 1207 (7th Cir. 1980) ..... 11

*United States v. Karo*, 710 F. 2d 1433 (10th Cir. (1983) ..... 4, 5, 9

*United States v. Knotts*, 103 S. Ct. 1081 (1983) ..... 3, 4, 5, 6, 7, 10, 11

*United States v. Michael*, 622 F. 2d 744, *vacated en banc*, 645 F. 2d 252 (5th Cir. 1980), *cert. denied*, 454 U. S. 950 (1981) ..... 3, 11

*United States v. Moore*, 562 F. 2d 106 (1st Cir. 1977), *cert. denied*, 435 U. S. 926 (1978) ..... 9

*United States v. Payner*, 447 U. S. 727 (1980) ..... 11

CONSTITUTION AND STATUTES:

U. S. Const. amend. IV ..... 4, 6, 7, 8, 9

U. S. Const. amend. VI ..... 10

18 U. S. C. §§ 3161-74 ..... 10

RULES:

U. S. Sup. Ct. R. 20.6 ..... 10

U. S. Sup. Ct. R. 21.1 ..... 1

No. 83-850

In The
# Supreme Court of the United States
October Term, 1983

UNITED STATES OF AMERICA,

*Petitioner,*

vs.

JAMES CONNORS KARO, EVAN ROTH, MICHAEL GAYLORD STEELE, RICHARD MILES HORTON, and WILLIAM ROBERTSON HARLEY,

*Respondents.*

**ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

**BRIEF IN OPPOSITION OF RESPONDENTS KARO, ROTH AND STEELE**

## OPINIONS BELOW

The government omits any reference to or inclusion of the oral opinion of the district court, which is unreported.[2] That opinion is therefore reproduced as the Appendix to this brief.

[2]See Sup. Ct. R. 21.1(d), 21.1(k)(i), and 21.1(k)(ii).

## FACTS

The government's statement of the facts is adequate except for the following errors and omissions.

The false affidavit, signed by a D.E.A. agent and drafted with the assistance of an assistant United States Attorney who knew the true facts, was not presented to a magistrate as the government says (Petition 6, n.4); it was presented directly to a United States district judge. It is this affidavit that the trial judge found to be "phony as a three dollar bill". (2A, *infra;* this and the quotation below are from the decision that the Solicitor General failed to include in the appendix to the Petition for Writ of Certiorari).

The government is correct in asserting that its agent and lawyer testified they had advised the judicial officer to whom they presented the affidavit that it was false. But it omits the more pertinent fact that the trial judge did not find that the judge who issued the warrant was so advised. Rather, he rebuffed the respondents' offer to call the issuing judge as a witness and their proffer that he would deny he was advised of the affidavit's falsity. He ruled that the government had "created the untenable situation" of asking one judge "to pass on the credibility of another." (Petition 21a; 2A-3A, *infra*). The trial judge then found:

> As far as the affidavit, I will say possibly there are not too many outright blatant falsehoods, but as a result of half-truths, innuendos, deliberate attempt to create an impression other than the actual fact, my view is that the original affidavit as putting it bluntly is as phony as a three-dollar bill. And then you have not only that, that it was deliberately conceived to

give a false impression, and I might add, a good job was done in that regard. Reading of that affidavit, you come out with a far different impression of the facts than the actual truth.

2A, *infra.*

---

## REASONS FOR DENYING THE WRIT

**POINT I: It is inappropriate for this Court to consider beeper issues so soon after United States v. Knotts.**

Since the mid-1970's, there have been a number of federal appellate decisions on the fourth amendment implications of electronic tracking devices, universally known as "beepers."[3] After the ramifications had been debated and the issues crystalized in the lower courts for a half-dozen years or more, this Court granted certiorari and decided *United States v. Knotts*, 103 S. Ct. 1081 (1983).

The government now seeks certiorari against the very first appellate court beeper decision subsequent to *Knotts*. This Court allowed the issues to mature for several years in the lower courts before stepping into the fray. It hardly seems consistent for this Court to take another similar case now before the courts have had a chance to digest and apply *Knotts*, particularly when the Court of Appeals applied *Knotts* with a great deal of care and analysis.

---

[3]Citations to several of the decisions and commentary they spawned during 1976-79 can be found in *United States v. Michael*, 622 F. 2d 744, 746-48, *vacated on banc*, 645 F. 2d 252 (5th Cir. 1980), *cert. denied*, 454 U. S. 950 (1981).

*Knotts* does not purport to definitively settle all beeper-related issues; it does provide the lower courts with this Court's rubric for analysis. If this rubric produces divergent analyses or results in the courts of appeals,[4] "there will be time enough then," *Knotts*, 103 S. Ct. at 1086, for this Court to resolve the issues enlightened *vel non* by the various lower court analyses.

**POINT II: There is not now a clear conflict among the circuits.**

The government's reliance here on asserted conflict among the circuits to justify certiorari misses the point: all of the cases it cites as being in conflict with the Court of Appeals' decision here were decided before *Knotts*. The government does not mention the two post-*Knotts* appellate decisions that analyze fourth amendment beeper issues; both of them *agree* with the Court of Appeals in this case. *United States v. Cassity*, No. 81-1565 (6th Cir. Oct. 31, 1983) (available Dec. 7, 1983 on LEXIS, Genfed Library Cir file); *United States v. Butts*, 710 F.2d 1139 (5th Cir.), *reh. en banc granted*, No. 82-1260 (Oct. 25, 1983). These cases focus more on the second issue here (whether the warrant clause of the fourth amendment applies) than the first (the moot question of installation of the beeper before receipt by the owner). Their analysis indicates that the *Knotts* decision may settle the

---

[4]Scanning the names of the reported decisions leads to the surmise that the beeper is used primarily by federal officers, so resolution of the issue will not be of great concern to the states, *i. e.*, to the vast majority of the nation's courts and policemen. This leads one to question why the devices are not used more frequently if they are as highly effective and as minimally intrusive of cherished rights as the government argues.

conflict among the circuits regarding the "legitimate expectations of privacy in the respective locations subjected to beeper monitoring, . . . without a warrant." *Cassity*, LEXIS, slip op. at 8.

The Court of Appeals' thoughtful decision here, together with the various Justices' concurring opinions in *Knotts*, may also settle the question of whether delivery of a covertly installed beeper to a citizen constitutes an intrusion without a consent to "continue the installation once the item belongs to someone else." 710 F. 2d at 1438; Petition 8a.

Further refinement of these issues can be expected from the Fifth Circuit's pending *en banc* consideration of *Butts*.

**POINT III: The Court of Appeals' decision rests soundly on established principles of expectation of privacy in the home.**

The decision of the Tenth Circuit Court of Appeals is consistent with this Court's decision in *Knotts*. The *Knotts* beeper transmitted from two distinct places: (1) automobiles on public roads, and (2) "open fields" as defined by *Hester v. United States*, 265 U.S. 57 (1924). 103 S. Ct. at 1085, 1087. In our case, in addition to transmitting from automobiles on public roads, the beeper transmitted from inside four homes and two storage lockers.[5] This Court in *Knotts* would not have approved this behavior. "Respondent Knotts, as the owner of the cabin and surrounding premises to which Petschen

---

[5]No rural areas were involved here, therefore, the "open fields doctrine" is of no avail to the government.

drove, undoubtedly had the traditional expectation of privacy within a dwelling place insofar as the cabin was concerned. . . ." 103 S. Ct. at 1085.

The Court of Appeals here reaffirmed the door to the home as the "firm line" drawn by *Payton v. New York*, 445 U. S. 573, 590 (1980), that the fourth amendment establishes between citizens and their government. This door may be the "bright line" so diligently sought, but so difficult to find in other fourth amendment contexts. See, *e. g., Robbins v. California*, 453 U. S. 420, 427-31 (1981) (Powell, J. concurring).

Agents of the federal government crossed this line on not less than six occasions during the five months the beeper tracked these respondents' activities. As the Court of Appeals so aptly stated, the facts in this case present intrusions far more egregious than those evident in *Knotts:*

> In the case before us the beeper was monitored while the can was in private residences and storage lockers. The beeper gave law enforcement officials information that could not be discovered by ordinary visual surveillance, even had that surveillance been constant. The *Knotts* case involved surveillance over only a few days; monitoring in the instant case took place over five months. In *Knotts* the drum was never inside a residence; here the ether was inside four residences. In *Knotts* the officers lost track of the automobile carrying the drum once on the public highway; here the officers lost track of the ether can for significant periods of time, after the ether had come to rest in residences and a rented locker. In the instant case, most of the tracing to new locations was possible only by use of the direction finder to locate the beeper.

710 F. 2d at 1439; Petition 9a-10a.

The Court of Appeals for the Sixth Circuit recently held that a warrant is required before government agents can monitor a beeper located inside a home. *United States v. Cassity*, No. 81-1565 (6th Cir. 1983) (Available Dec. 7, 1983, on LEXIS, Genfed Library, Cir file), involved a virtual remake of the scenario here. In *Cassity*, the investigative efforts of the D. E. A. spanned five months during which time chemicals and equipment containing three beepers found their way into the homes of each defendant. There, too, the search warrants were invalid.

In reversing the denial of the defendant's motion to suppress evidence, the Sixth Circuit also viewed *Knotts* as relying upon the "automobile exception" to the fourth amendment, *Cardwell v. Lewis*, 417 U. S. 583 (1974) and the "open fields" doctrine, *Hester v. United States*, 265 U. S. 57 (1924). "Nothing in the Court's opinion [in *Knotts*] abrogates the sanctity of a private home or dwelling place." *Cassity*, LEXIS slip op. at 5.

Neither this Court's opinion in *Knotts*, nor the Court of Appeals opinion in this case do more than apply traditional fourth amendment concepts to innovative technology.[6] Review by this Court is unnecessary.

---

[6]In a footnote, the government poses a conundrum. Petition 16-17 n. 8. In an attempt to say the problem is so conceptually difficult that the Court should grant certiorari and solve it by discarding the warrant requirement, the government suggests throwing out the baby with the bathwater. It is said that since the warrant cannot specify all homes that the beeper might enter, there can be no valid warrant. *Id.* The government cites no lower court decisions as evincing concern with

(Continued on following page)

**POINT IV: A ruling justifying warrantless installation of a beeper would not change the result reached in this case.**

The government's first issue assails the Court of Appeals' opinion that a warrant was required for the insertion of the beeper into Mr. Karo's ether before Mr. Karo came into possession of it. This was dictum or, at most, an alternative rationale for a decision as to Mr. Karo only, because the Court of Appeals also held that Mr. Karo suffered the same intrusion into his home as did the other four respondents.

The Court of Appeals' holding regarding respondent Karo is firmly rooted in his fourth amendment right to privacy inside his home. His rights in this case do not depend upon what rights he may have had at the time the agents installed their beeper. The installation issue, therefore, appears inappropriate for review.

**POINT V: The infringement of Karo's fourth amendment rights began at the time the ether came into his possession.**

Although the Court of Appeals based its decision as to all the respondents on the fourth amendment invasion of their homes and private storage lockers, that Court was also correct in holding that "before the government agents

---

(Continued from previous page)

this rather arid intellectual exercise. If and when the lower courts do choose to engage in the exercise, several possibilities are readily apparent. Wiretaps, for example, present the same problem: The warrant can only specify the telephone on which the tap is placed, leaving open the certainty that the various unspecified persons who call, are called, or who simply happen to use the tapped phone will be intercepted.

could transfer the can of ether containing a beeper to Karo, they had to obtain an authorizing warrant." 710 F. 2d at 1439; Petition 9a. The logic of the Court of Appeals' decision is clear. Regardless of who has custody of the container at the time the beeper is installed and thus gives consent to the installation, the infringement of fourth amendment rights begins at the time the object comes into the target's possession. 710 F. 2d at 1438 n.3, Petition 8a, *citing United States v. Moore,* 562 F. 2d 106 (1st Cir. 1977), *cert. denied,* 435 U. S. 926 (1978) and *United States v. Clayborne,* 584 F. 2d 346 (10th Cir. 1978). So even if this issue were to be reached, a decision by this Court would probably not contribute greatly to the development of the law.

**POINT VI: The Petition for certiorari was not timely filed.**

The Court of Appeals' decision here was June 20, 1983; the government's petition for rehearing was denied on August 26, 1983. Almost four months after the decision and almost two months after the denial of rehearing, the Solicitor General filed an application for an extension of time to seek certiorari in October, 1983. The reason: "To determine whether to file a petition for a writ of certiorari . . . ." Yet, in a motion for extension of time to file its petition for rehearing in the Court of Appeals, the government represented that the Solicitor General and the Appellate Section of the Justice Department were, on June 27, 1983, commencing "review of the opinion and briefs in this matter to determine whether further appellate review should be sought."

The application for extension was routinely granted the day *before* the respondents' counsel learned, by receipt of the service copy, that the application had been

filed. Thus, the only opportunity for respondents to oppose the extension is in this brief.

This Court's Rule 20.6 requires a showing of "good cause," as well as specific "reasons why the granting of an extension of time is thought justified." The government's only attempt to comply with this rule was the application's statement that, in effect, the government had not yet made up its mind whether to seek certiorari. Because "such applications are not favored", *id.*, it should be presumed that litigants are expected to, at a bare minimum, decide whether to seek certiorari at some time during the sixty days allotted for this process. Most litigants are bound by the sixty days to actually prepare, print and file the petition. Normal prudence indicates that the government would start thinking whether it wanted to come to this Court as soon as it received the Court of Appeals' decision. That the Solicitor General cannot make up his mind in four months appears incredible. And, credible or not, inability to make one's mind up without some reason for this inability is not "good cause." It certainly does not comport with the spirit of the sixth amendment's speedy trial clause, or the Speedy Trial Act, 18 U. S. C. §§ 3161-74.

It may be that the Solicitor General's inability to make up his mind is attributable only to bureaucratic inertia. Since Circuit Justices grant such requests as a matter of course, denial of certiorari (there will be plenty of beeper cases in the future) may clear up some of this inertia.

It may be that the inability to decide reflects real problems with the appropriateness of this case as a ve-

hicle to consider these issues, as developed elsewhere in this brief. This case also illustrates the unsoundness of the argument the Solicitor General incorporates from his brief in *Knotts*[7] that the warrant requirement in these circumstances unduly hampers law enforcement. Petition 16-17; Brief for the United States at 30-31, 35, 39, *United States v. Knotts*, No. 81-1802 (U. S. 1983 Term). In our case, the government had no difficulty obtaining its search warrant; its problems began when it chose to lie to the district judge in the process. The "societal cost of obtaining a warrant," *Arkansas v. Sanders*, 442 U. S. 753, 759 (1979), would have been minimal had the government told the truth.

**POINT VII: The government's contentions are not ripe for Supreme Court review.**

There is a significant unresolved issue in this case. In both lower courts, the respondents argued that the D. E. A. agents' misrepresentations to the district judge constituted misconduct so outrageous as to require dismissal under the due process clause and the court's supervisory power. The factual situation is very much like that in *United States v. Cortina*, 630 F. 2d 1207, 1214-17 (7th Cir. 1980), as well as the *Cortina* court's legal analysis of *United States v. Payner*, 447 U. S. 727 (1980). Neither lower court has yet ruled on this contention. There has been no indication that the government believes the presently decreed suppression will preclude maintaining the prosecution against these respondents. *Cf. Michael v. United*

---

[7]The government's *Knotts* brief is cited in the petition at page 17, note 7, for its arguments that no warrant should be required to monitor a beeper.

*States,* 454 U. S. 950 (1981) (White, J. dissenting) (another beeper case in which this court denied certiorari).

Respectfully submitted,

NANCY HOLLANDER
FREEDMAN, BOYD & DANIELS, P.A.
20 First Plaza, Suite 212
Albuquerque, NM 87102
(505) 842-9960
*Counsel for Respondent Karo*

REBER BOULT
1412 Lomas Blvd., NW
Albuquerque, NM 87102
(505) 842-0392
*Counsel for Respondent Roth*

JAMES BEAM
715 Tijeras, NW
Albuquerque, NM 87102
(505) 842-5924
*Counsel for Respondent Steele*

## APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 81-21 Cr.

UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

JAMES CONNORS KARO, et al.,

*Defendants.*

BE IT REMEMBERED, that on to-wit, the 11th day of May, 1981, this matter came on for Hearing on Motion before the HONORABLE HOWARD BRATTON, United States District Judge, sitting in open court at Albuquerque, New Mexico, at the hour of 9:30 o'clock A.M.

The Court: Thank you very much, counsel. We do have a very unfortunate situation, not the least of which is that the confidence of the Court and the affidavits that might be presented to it, I would say, is shaken at a minimum. I will just—the Motion to Suppress will be granted and I will give you my reasons why. Well, a chance to make some law in the Tenth Circuit on various points here, if you want. First of all, as to whether a warrant is needed for a beeper under these circumstances, there is, of course, a split in the circuits on that issue. It has been my feeling straight along, that a beeper is an intrusion; it's a search. It should require a warrant. Government agencies should not be free to just implant them

at will. It should come through the normal Fourth Amendment warrant probable cause process. And I would say very particularly, so I realize that one circuit, I think the Ninth or somebody—I think the Ninth, saying that it is not an intrusion because it does no more than track something that you could track with the eye, where you plant a beeper in a vehicle or something like that, that it could be followed. Well, five months—you can't—it's not possible to follow around for five months. That's what happened here as a result of having that beeper in there for five months. All told, I think a warrant for a beeper, under these circumstances, was required.

As far as the affidavit, I will say possibly there are not too many outright blatant falsehoods, but as a result of half-truths, innuendos, deliberate attempt to create an impression other than the actual fact, my view is that the original affidavit as putting it bluntly is as phony as a three-dollar bill. And then you have not only that, that it was deliberately conceived to give a false impression, and I might add, a good job was done in that regard. Reading of that affidavit, you come out with a far different impression of the facts than the actual truth.

Now, as to—I don't know that it would make any difference whether or not the affiant or the U. S. Attorney supplied additional information to a Magistrate issuing the affidavit or issuing the warrant, that is a Judge in this case, but under any circumstances, you have a flat conflict in the evidence between the D.E.A. agent and the U. S. Attorney, as to whether or not the Judge was told anything outside of the affidavit. Since the government created that situation, that conflict, it's easy to resolve, it goes against the government. I find that the Judge was

not told anything outside of the affidavit, if that is material.

Now, I think the law is clear as far as the probable cause, you can't go outside of the affidavit, the sworn testimony. Just as far as what's right and what's wrong, it presents a terrible situation the government has done and created here.

Now, as far as standing, in my view, the installation of a beeper is a continuing search. It's not just a search when it's put on the can on the loading dock, or wherever, it's a search wherever that can is tracing. And that's the purpose of the whole thing, is to—and as is evident in this case, it did a good job. I say, accordingly, I think each person has standing, has demonstrated standing to challenge, except maybe the Defendant Roth is the only one I have a question about in that regard. Everyone else has demonstrated some connection with, or expectation of privacy where the can was intruded. Some have demonstrated ownership or possession of it. But rather than further complicate the situation, I will just grant the motion to suppress as to all of the Defendants.

Now, as to the fact that there might have been additional probable cause developed and shown as the matter went along, that might be so. But I don't think you can cure the ill if it hadn't been for the faulty beginning, it would have lost track of the whole thing right at the start, and the fact that they subsequently developed probable cause, I think, is just a product of the initial improper affidavit and deception of the Court.

Now, in granting the Motion to Suppress, let me—I will just add another thing. I take no—I think there is

a great deal to be said for the Chief Justice's view that suppression is not necessarily the answer where the law officials do something improper. The Chief Justice's view that perhaps other solutions such as lawsuits, disciplinary action or other matters are more appropriate where perfectly reliable evidence is developed and then has to be suppressed because of something that has been done wrong, either deliberately or inadvertantly by the law officials. Unfortunately, this was done wrong, deliberately. Whether they thought they were doing wrong or not, they were. Perhaps one of these days the Chief Justice's view will prevail and will not be necessary to suppress reliable evidence because of the errors in malfeasance of the law enforcement officials. Those will be my findings and conclusions. And the order of the Court, the evidence seized at the—all of the evidence seized at the search of the house in Taos, will be suppressed. That makes it unnecessary, I suppose, to rule on the severance of counts—the other two counts as to the Defendant Karo. It makes it unnecessary to rule as to the Horton confession. That Motion to Suppress will be granted. I assume the government will want to exercise its right of an interlocutory appeal, and you can obtain a ruling on the various legal matters I have made—I have discussed here, and also if you want the factual matters I have ruled upon. That being the posture of the case, how do you want to handle it? Enter an order suppressing the motion, and then you can take your interlocutory appeal?

Mr. Smith: Judge, that's correct. There is one question about the posture of the case that occurs to me. That is, that you have suppressed the evidence seized in Taos in February. We still have Mr. Karo charged with possession and sale in Albuquerque on the 20th of September.

The Court: Those are the two counts I have set out. I haven't suppressed anything as to that. I said it makes it unnecessary to rule on the severance as to those two counts, because those are—that's a different matter.

What's your desire? Do you want to proceed to trial on those two counts while the other matter as to the basic lawsuit goes up to the circuit, or what?

Mr. Smith: I'd like to think about that, Your Honor. My inclination is to keep it all in one place.

The Court: Let me suggest to you, why don't you think it over, get together and present an order in accordance with what I have decided today. Defense, you can get out the order and consult with Mr. Smith and get it in the proper form where there is no question about it, and it's a final or appealable order, and which it is, of course. And get that to me in the next couple of days. And then we will enter that and then you can decide what you want to do. You will have to decide very promptly. I guess you have a trial date set for the first of June. You will have to decide whether to go up or call a halt before that.

Mr. Smith: Judge, I'd like to ask one question about one of your findings of fact, only because I will be asked. I'm not quarreling with it. I may not agree with it, but I'm only looking for the reference. May I do that?

The Court: What's your problem?

Mr. Smith: My question about—is the conflict which you have reference in testimony of Agent Rottinger and Mr. Blackmer concerning whether or not Judge Mechem was told about Mr. Mulenwig's cooperation. My recol-

lection of the testimony, and I only offer it as mine, is that there wasn't such a conflict. And I—if I miss something, I just want to know where that finding is rooted, not because I want to quarrel with it, but if somebody asks me, I want to be able to respond.

The Court: I thought it was very clear. At the end of his testimony, he said all he told Judge Mechem was that they were coming there because of the Law Clerk situation down in the Magistrate's Office.

Mr. Smith: Is that Mr. Blackmer or Mr. Rottinger?

The Court: Mr. Rottinger said that, and he was asked two or three times. That's exactly what he said. I don't think—I'm not sure if it would make any difference what is said outside of the affidavit and what not. But if there is any question about it, I make the specific finding that Judge Mechem was not told anything outside of the—as to the facts outside of the affidavits.

Court's in recess.

Office-Supreme Court, U.S.
FILED
DEC 29 1983
ALEXANDER L. STEVAS

No. 83-850

In The
# Supreme Court of the United States
October Term, 1983

UNITED STATES OF AMERICA,
*Petitioner,*

vs.

JAMES CONNORS KARO, ET AL.,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF OF WILLIAM ROBERTSON HARLEY AND RICHARD MILES HORTON IN OPPOSITION

WILLIAM MARCHIONDO
Attorney for Respondent
RICHARDS MILES HORTON
P.O. Box 568
Albuquerque, New Mexico
87103
(505) 247-0751

JOSEPH (SIB) ABRAHAM, JR.
CHARLES LOUIS ROBERTS
Attorneys for Respondent
WILLIAM ROBERTSON HARLEY
P.O. Box D
El Paso, Texas 79951-0004
(915) 544-7860

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

## QUESTIONS PRESENTED BY PETITIONER

1. Whether warrantless installation of a beeper inside a container of chemicals with the consent of the original owner violates the Fourth Amendment rights of a suspect in a drug manufacturing scheme to whom the container is subsequently transferred.

2. Whether the warrantless monitoring of signals from a beeper installed inside a container of chemicals that law enforcement authorities reasonably believe will be used to manufacture illegal drugs violates the Fourth Amendment when the monitoring occurs while the beeper is located within a home or other "private" area (such as a commercial storage locker).

## RESPONDENTS' REFORMULATION OF THE QUESTIONS PRESENTED

1. Whether a citizen has a reasonable expectation of privacy in a sealed chattel expected to be delivered to him that would be abridged by the warrantless insertion of an electronic signalling device which was intended for the purpose of monitoring the movements of that chattel after it came into his possession.

2. Whether a citizen has a reasonable expectation of privacy that would be abridged by the warrantless operation and monitoring of an electronic signalling device located inside a residence or other private area.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED BY PETITIONER | i |
| RESPONDENTS' REFORMULATION OF THE QUESTIONS PRESENTED | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF CITATIONS | iii |
| OPINIONS BELOW | 1 |
| QUESTIONS PRESENTED | 2 |
| CONCLUSION AND PRAYER | 20 |
| APPENDIX A | App. 1 |


## TABLE OF CITATIONS

CASES:


| | |
|---|---|
| *Dunaway v. New York*, 442 U. S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979) | 8 |
| *Elkins v. United States*, 364 U. S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960) | 20 |
| *Johnson v. United States*, 333 U. S. 10, 68 S. Ct. 367, 92 L. Ed. 436 (1948) | 12 |
| *Katz v. United States*, 389 U. S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) | 3, 9, 10, 14, 21, 22, 25, 26 |
| *Mallory v. United States*, 354 U. S. 449, 77 S. Ct. 1356, 1 L. Ed. 2d 1479 (1957) | 20 |
| *Mesarosh v. United States*, 352 U. S. 1, 77 S. Ct. 1, 1 L. Ed. 2d 1 (1956) | 20 |
| *McNabb v. United States*, 63 S. Ct. 608, 87 L. Ed. 2d 819 (1943) | 20 |
| *N.A.A.C.P. v. Alabama*, 357 U. S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 | 21 |

TABLE OF CITATIONS—Continued

Page

*Olmstead v. United States*, 277 U. S. 438,
48 S. Ct. 564, 72 L. Ed. 944 (1928) ..... 20

*Payton v. New York*, 445 U. S. 573,
100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) ..... 13

*Tehan v. Shott*, 382 U. S. 406,
86 S. Ct. 459, 15 L. Ed. 2d 453 ..... 21

*Terry v. Ohio*, 392 U. S. 1,
88 S. Ct. 1868, 20 L. Ed. 2d 889 ..... 6, 7, 8

*United States v. Bailey*, 628 F. 2d 938,
(6th Cir. 1980) ..... 11, 13

*United States v. Bernard*, 625 F. 2d 854,
(9th Cir. 1980) ..... 11

*United States v. Brock*, 667 F. 2d 1311,
(9th Cir.) cert. denied No. 81-6922
(Mar. 7, 1983) ..... 13

*United States v. Bruneau*, 594 F. 2d 1190,
(8th Cir.) ..... 11

*United States v. Cassity, et al.*,
Slip Opinion Nos. 81-1565, et seq.
(October 31, 1983) ..... 13

*United States v. Clayborne*, 548 F. 2d 346
(10th Cir. 1978) ..... 9

*United States v. Cortina*, 630 F. 2d 1207
(7th Cir. 1980) ..... 19, 20

*United States v. Karo*, 710 F. 2d 1433
(10th Cir. 1983) ..... 4, 7, 9, 11, 13, 26

*United States v. Knotts*, — U. S. —,
103 S. Ct. —, 75 L. Ed. 55 ..... 6, 7, 9, 11, 12, 13, 14

*United States v. Lewis*, 621 F. 2d 1382
(5th Cir. 1980) ..... 11

TABLE OF CITATIONS—Continued

Page

*United States v. Martinez-Fuerte*, 428 U. S. 543 (1976) ..... 6, 8

*United States v. Mendenhall*, 446 U. S. 544 (1980) ..... 6, 8

*United States v. Moore*, 562 F. 2d 106 (1st Cir. 1977) ..... 13

*United States v. Place*, — U. S. —, 103 S. Ct. —, 77 L. Ed. 2d 110 (1983) ..... 8

*Upshaw v. United States*, 335 U. S. 410, 69 S. Ct. 170, 93 L. Ed. 100 (1948) ..... 20

No. 83-850

In The
# Supreme Court of the United States
October Term, 1983

UNITED STATES OF AMERICA,
*Petitioner,*

vs.

JAMES CONNORS KARO, ET AL.,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF OF WILLIAM ROBERTSON HARLEY AND RICHARD MILES HORTON IN OPPOSITION

### OPINIONS BELOW

The opinion of the Court of Appeals affirming the order of the District Court (Pet. App. 1a-15a)[1] is reported

[1]Petitioner's *Petition for Writ of Certiorari* and *Appendix* will be cited as Pet., Pet. App., etc. Respondent's (Harley and Horton) *Brief in Opposition* and *Appendix* will be cited at Resp., Resp. App., etc.

at 710 F. 2d 1433. The memorandum opinion of the District Court overruling the Government's *Motion to Reconsider* (Pet. App. 16a-22a) is not reported. The oral findings and decision of the District Court (RII 331-337) which was not cited nor reproduced in the Petition is reproduced herein at la et seq.

## QUESTIONS PRESENTED

The United States presented the following two questions:

> 1. Whether warrantless installation of a beeper inside a container of chemicals with the consent of the original owner violates the Fourth Amendment rights of a suspect in a drug manufacturing scheme to whom the container is subsequently transferred.
>
> 2. Whether the warrantless monitoring of signals from a beeper installed inside a container of chemicals that law enforcement authorities reasonably believe will be used to manufacture illegal drugs violates the Fourth Amendment when the monitoring occurs while the beeper is located within a home or other "private" area (such as a commercial storage locker).
>
> Pet. at (i)

Along with opposing certiorari, the Respondents object to these questions as not being proper formulations of the issues, and would propose the following formulations in the alternative:

> 1. Whether a citizen has a reasonable expectation of privacy in a sealed chattel expected to be delivered to him that would be abridged by the warrantless insertion of an electronic signalling device

which was intended for the purpose of monitoring the movements of that chattel after it came into his possession.

2. Whether a citizen has a reasonable expectation of privacy that would be abridged by the warrantless operation and monitoring of an electronic signalling device located inside a residence or other private area.

Resp. at (i)

Respondents would point out that if one reverses the order of the Government's "Questions Presented," *supra*, they are virtually identical to those rejected by this Court in *Katz v. United States*, 389 U. S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967):

"A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such booth is obtained in violation of the right to privacy of the user of the booth.

"B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United State (sic) Constitution."

*Katz*, 389 U. S. 349-350

Justice Stewart, writing for the Court, felt compelled to "decline to adopt this formulation of the issues," 389 U. S. at 350. The Court felt that the issues had been formulated in a "misleading way", 389 U. S. at 350 because the Government had relied upon the idea of a "constitutionally protected area" as against focusing upon the individual and his reasonable expectation of privacy, 389 U. S. at 350-353." "The Fourth Amendment protects people, not places," 389 U. S. at 350-351. Here some fifteen years after having their view of the issues rejected in *Katz* be-

cause the proper focus was not spatial, physical areas nor formal property interests the Government now renews the same "misleading" formulation in apparent hope that this Court will focus on legal "trespass" as against the reasonable expectation of privacy held by the citizen. The Government also encumbers its "Questions" with misleading surplusage dealing with drug traffic, etc., without even suggesting much less advocating that the license that they seek in this case would only be applicable to the drug traffic problem, (Pet. (I), Pet. 1, et seq.). The use of such language merely grafts argument upon issue in such a way as to deflect this Court's focus and to cloud its decision. The Respondents therefore urge that this Court reject the formulation of issues proposed by Petitioner and accept the reformulations proposed by Respondents.

## I. The Decision Of The Tenth Circuit In Karo Is Not Only Correct, But Consistent With the Precedents Of This Court.

### A. The Decision of the Tenth Circuit in Karo is Consistent With the Thrust and Spirit of the Controlling Precedents Laid Down by This Court.

#### 1. *The Implantation of the Electronic Signalling Device.*

This issue should be analyzed in the fullest possible perspective. First, from the factual viewpoint we should note the following salient facts which cannot be disputed: (a) the sealed drum and its contents were legally possessed and must be considered as lawful chattels,[2]; (b) at

---

[2]Even though the United States has conceded standing, the Respondents would point out that: (1) Horton, Harley, and Karo jointly purchased the ether through Muehlenweg,

(Continued on following page)

the time of installation, the electronic signalling device was intended to betray the presence of the sealed drum after it was delivered to the Respondents in this cause; (c) at the time of installation, it was anticipated that the electronic signalling device would find its way into at least one if not more private areas where an expectation of privacy presumably existed.[3]

After observing these facts, it is convenient to deal with the Government's justifications for a warrantless installation of this electronic signalling device even though such justifications overlap into the area of continued monitoring electronic signalling devices within private homes and storage lockers.

a. *"Substantial, if not Compelling [Interest]" (Pet. 15)*

---

(Continued from previous page)

each paying "$1,000.00", (RII 300); (2) the ether was delivered to Horton's house on Wellesley Street, (RIV Gov. Ex. 10); (3) the Respondents were recognized by Muehlenweg and the Government as the "ultimate users", (RII 258); (4) Horton and Harley personally rented both private storage lockers where the drums were kept, (RII 301), paid rent, (RII 301), had the keys, (RII 301, 314), and checked periodically on the contents; and (5) both Horton and Harley paid rent on the Taos house which was the ultimate destination and situs of the search, (RII 299-302), had lived in the house for some time, (RII 276, 298, 305), were living there at the instant of the search, (RII 116), and received the refunds of the rent after the search, (RII 299).

[3]The Government contended below and again admits here that the electronic signalling device was supposed to betray its presence in at least its ultimate destination which was expected to be a "clandestine laboratory," presumably an area where an expectation of privacy existed (see Pet. 13-17). Actually, though the Government could contend that it was anticipated that the device would travel by road, but had no actual travel or route plans at the time of installation.

The interest is that the Government's efforts at law enforcement would be aided by knowledge of the location and movement of its citizen's chattels. Toward this end, the Government cites *United States v. Martinez-Fuerte,* 428 U. S. 543 at 555 (1976), and similar cases, but to little avail. In *Martinez-Fuerte* this Court found the interest of combatting drug smuggling plus the interest of combatting alien smuggling plus the proximity of the international boundary to be compelling enough to justify a brief *stop and questioning* of the occupants *of a vehicle,* hardly the situation of our case. *Martinez-Fuerte, supra, Terry v. Ohio,* 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) and *United States v. Mendenhall,* 446 U. S. 544, 561-562 (1980) involve situations where the warrant requirement would actually frustrate the public interest because the delays or difficulties occasioned by meeting the constitutional standards at the moment of confrontation between police officer and suspect in the street in *Terry,* 392 U. S. at 9-11; at the moment of confrontation between Border Patrol officer and northbound traffic at a border checkpoint in *Martinez-Fuerte,* 428 U. S. at 556-557; and at the moment of confrontation between narcotics officer and suspect at an international airport in *Mendenhall,* 446 U. S. at 561-563. However, what would be the outcome if the public interest could co-exist with the Fourth Amendment interest without injury to either? In our case, warrants, orders to seal, extensions, and the like were routinely and easily obtained (RIV Gov. Ex. 5, etc.). In our case and in *United States v. Knotts,* — U. S. —, 103 S. Ct. —, 75 L. Ed. 55 at 59-60, the facts indicate: (1) prior knowledge; (2) arrangements with a chemical company to insert an electronic signalling device; and (3) arrangements for

monitoring a beeper, all facts which allow substantial time to obtain a warrant. Indeed, the non-existence of facts (1) and (2) in *Karo* or in *Knotts* would probably preclude installation of the electronic signalling device and remove the problem of balancing anything. Thus, we can see that the question of balancing the alleged "substantial, if not compelling [interest]" (Pet. 15) of the Government in this case is properly expressed as: Do our municipal, state, and federal government have such a "substantial, if not compelling [interest]" (Pet. 15) in the location and movements of a citizen's chattels so to overcome the minimal judicial inference mandated by the warrant requirement of the Fourth Amendment which would not endanger nor significantly impede the public interests?

b. *Minimal Intrusion*

The Government argues that because of "the limited intrusion, if any, on privacy interests resulting from beeper surveillance, use of a beeper to locate a source of illegal drugs is fully justified on the basis of reasonable suspicion that criminal activity is afoot". (Pet. 16), thereby seeking to bring the beeper into the *Terry v. Ohio* situation where a compelling public need (which we have already discussed) overcomes a limited intrusion. The Government argues that the intrusion is "slight" because the electronic signalling device only "broadcasts 'here I am'" (Pet. 14).[4] What the Government fails to acknowledge is that the *Terry* line of cases that it cites all require that *the intrusion*

---

[4]This assertion is not quite correct, the electronic signalling device tells (1) "here I am"; and later, (2) "I am still here"; with continual monitoring; (3) "I have been here this long"; with a moving signal; (4) "I am moving"; and with a weak signal; (5) "I am far away", etc. With further predictable technological advances it could also tell: "I am in the northeast corner of the building"; or "I am being moved (so as to suggest use)."

*be limited in all respects,* extent of intrusion, duration, and locality, see *Terry, supra; Martinez-Fuerte, supra; Mendenhall, supra.* When we examine any of these cases and, for example, alter the duration factor, the result changes. *Mendenhall* becomes *United States v. Place,* — U. S. —, 103 S. Ct. —, 77 L. Ed. 2d 110 (1983) where the Court noted: . . . the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion. . . . [thus] the 90-minute detention of respondent's luggage is sufficient to render the seizure unreasonable, 77 L. Ed. 2d 122, citing *Dunaway v. New York,* 422 U. S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979). What is the "limited intrusion" is for five months as in our case instead of for 90 minutes? The same result happens even more forcefully in *Terry* and in *Martinez-Fuerte.* What result when officer McFadden pats and frisks John Terry for five months? What results when Amado Martinez-Fuerte is questioned for five months?[5] Different result? The limited nature of the intrusion is only limited in the scope of the search if it is limited in that respect.[6] Limitations in the scope of the search have never in themselves been sufficient. Since this Court's opinion in *Chadwick* applies the Fourth Amendment to a person's things and containers and since *Place* places a duration requirement on reasonable suspicion intrusions on things and containers, it would follow that *Terry, Martinez-Fuerte,* and *Mendenhall* lead the Government back to the warrant requirements of the Fourth Amendment.

---

[5]Location is also a factor which must be limited. What if Terry is frisked at five different houses and two different storage areas?

[6]See Footnote 4, *supra.*

c. *The Tenth Circuit Application of Katz*

The Tenth Circuit in *United States v. Karo,* 710 F. 2d 1433 (10th Cir. 1983) held that a warrantless installation of an electronic signalling device into the drum of ether under these circumstances was in violation of the Fourth Amendment, 710 F. 2d at 1439. In reaching this decision, the Tenth Circuit noted that this Court in *Knotts,* 103 S. Ct. at 1082 n*, had not reached this issue because it was not raised. The Tenth Circuit built upon its Circuit precedent of *United States v. Clayborne,* 584 F. 2d 346 (10th Cir. 1978) which agreed with the proposition "that the fact that the Defendant (sic) initially had no rights in the chemical boxes was not of any significance since they later obtained lawful possession, and the agents sought to use the electronic devices after this," 584 F. 2d at 349, 349 n.1. However, the primary thrust of the *Karo* opinion was that the *Katz* analysis of the citizen's "legitimate expectation of privacy" compelled this result, *Karo,* 710 F. 2d at 1438. In applying *Katz,* the Tenth Circuit wrote:

> All individuals have a legitimate expectation of privacy that objects coming into their rightful ownership do not have electronic devices attached to them, devices that would give law enforcement agents the opportunity to monitor the location of the objects at all times and in every place that the objects are taken, including inside private residences and other areas where the right to be free from warrantless governmental intrusion is unquestioned.
>
> 710 F. 2d at 1438.

In contrast one can easily overlay the Government's arguments in this case over the facts in *Katz.* The Government would argue that: (1) the phone booth is owned by the phone company not by Katz, 389 U. S. at 352-353; (2) the electronic surveillance device was implanted on the

booth before Katz entered, 389 U. S. at 354 n.14; (3) Katz has no rights outside the booth, 389 U. S. at 352; (4) Katz enters of his own free will, 389 U. S. at 352-54; and the intrusion is minimal since the device does not intrude physically into the booth, 389 U. S. at 353. Seen from another viewpoint, would the *Katz* Court have let Katz's private conversations be monitored by an electronic surveillance device secreted within a box of groceries before Katz purchased them? Thus we can see that the facts of installation are actually inconsequential in comparison to the evaluation of the citizen's reasonable expectation of privacy which is the correct standard in such a case.

As in the formulation of the issues (Pet. (i)) the Government attempts to avoid the expectation of privacy analysis through a series of limited questions: Was not Muehlenweg the title owner (though not the legal owner) of the ether; did not Muehlenweg give consent to the Government; was not the electronic signalling device planted in the drum before delivery to Messrs. Karo, Horton, and Harley, etc.? These questions are of minimal importance in comparison to the central issue they mask. Would a citizen be justified in relying on an expectation of privacy in his personal possession to the effect that these items were not electronic transmitters continually betraying their location and movement to law enforcement officers of the city, state and nation where he resides? This is the central question which the Government avoids. The reason for their avoidance is found in the answer that is compelled by the question.

### d. *Circuit conflict and Other Reasons*

Respondents admit that the Circuits are in apparent conflict regarding the need of a warrant to install an elec-

tronic signalling device in a citizen's chattel, compare *Karo* with *United States v. Lewis,* 621 F. 2d 1382, 1388 (5th Cir. 1980); *United States v. Bruneau,* 594 F. 2d 1190, 1194 (8th Cir.), cert. denied, 444 U. S. 847 (1979); *United States v. Bailey,* 628 F. 2d 938, 943 (6th Cir. 1980); and numerous Ninth Circuit cases such as *United States v. Bernard,* 625 F. 2d 854, 860 (9th Cir. 1980). Respondents would note that these cases precede both *Karo* and this Court's own opinion in *Knotts* wherein three concurring members of this Court voiced strong concern about the legality of the warrantless installation, *Knotts,* 75 L. Ed. at 65, 66 and where the opinion of the Court was careful to add that the issue was not decided because it was not raised, *Knotts,* 75 L. Ed. at 60 n.*. Respondents assert that consideration of this Court's opinion in *Knotts* together with consideration of a denial of certiorari in this cause by Courts in conflict could easily erase this conflict. Aside from this, the question is clearly insubstantial because (1) the Government did obtain a warrant in this case and now is in effect asking only for a retroactive approval of its international misrepresentation in the warrant affidavit, and (2) this question would not be determinative of the case if answered in the Government's favor because such an answer would still leave the second issue which revolves around the operation and monitoring of electronic signalling device.

2. *The Operation and Monitoring of the Electronic Signalling Device.*

The government seeks to justify the warrantless operation and monitoring of the electronic signally device for over five months[7] in five houses and in two private

[7]The Government admits that the electronic signalling device was utilized to locate the ether in new locations several

(Continued on following page)

storage lockers as a practice that only requires "reasonable suspicion." (See Pet. 13-16).

a. *Virtually Unanimity in the Circuits.*

The Government urges this in spite of the fact that even Justice Rehnquist specifically observed in *Knotts* that: "Respondent Knotts, as the owner of the cabin and surrounding premises to which Petschen drove, undoubtedly had the traditional expectation of privacy within a dwelling place insofar as the cabin was concerned," *Knotts,* 75 L. Ed. 2d at 62; and quoted *Johnson v. United States,* 333 U. S. 10, 13-14, 68 S. Ct. 367, 92 L. Ed. 436 (1948) for the proposition that:

> Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home

---

(Continued from previous page)

times. Indeed, since there was a paucity of surveillance the trail of the ether would have been lost four times but for the information provided for by the electronic signalling device. (See RIV. Govt. Ex. 6, 7, and 10). On these occasions the electronic signalling device's signals betrayed the ether's presence from within two private homes and two private storage lockers, (RIV. Govt. Ex. 6, 10), after significant lapses of time. The Government states as fact that "this same information could have been obtained by usual surveillance," (Pet. 12); however, no evidence was offered that the drums would have been visible to visual surveillance at the times when the drums were moved and temporarily lost, (See Pet. 2-9). The Government has no idea whether the drums were visible or whether they were (1) covered, (2) crated, or (3) placed into a vehicle, van, or pick-up which had been backed into the garages of the homes or into the storage areas so as to block visibility of the transfer. The Government can only speculate as to nature of the pick-up, van, helicopter, or whatever which transferred the drums. In seeking to equate its sporadic visual surveillance in this case with that in *United States v. Knotts,* No. 81-1802 (Mar. 2, 1983), the Government engages more in wishful thinking than in facts actually observed.

> is also of grave concern, not only to the individual, but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search, is as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent. *Johnson v. United States*, 333 U. S. 10, 13-14, 68 S. Ct. 367, 92 L. Ed. 436 (1948) (footnote omitted), quoted with approval in *Payton v. New York*, 445 U. S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).

75 L. Ed. 2d at 62.

Every circuit save the Ninth[8] (which has not dealt with the issue since *Knotts*) has uniformly drawn a "bright line" in front of the residence and other private areas, see *Karo, United States v. Moore*, 562 F. 2d 106 (1st Cer. 1977), cert. denied, 435 U. S. 926 (1978), *United States v. Bailey*, 628 F. 2d 938, 944 (6th Cir. 1980); *United States v. Cassity, et al.*, Slip Opinion Nos. 81-1565 et seq. (October 31, 1983). Both the Tenth Circuit in *Karo* and the Sixth Circuit in *Cassity* specifically utilized this Court's strong words in *Knotts* to reach their result, *Karo*, 710 F. 2d at 1439-1450; *Cassity*, (Lexis Opinion), at pp. 4-5. It is anticipated by Respondents that examination of *Knotts*, *Karo*, and *Cassity* will bring the Ninth Circuit into the fold thereby obviating any need for certiorari.

b. *The Dangers Inherrent in Reducing the Protections of a Private Home to Accommodate Technological Advance.*

Apparently the majority of this Court took little notice of the grim prophesies that Counsel for Respondent made in *Knotts*, 75 L. Ed. 2d at 63, stating in effect that

---

[8]See *United States v. Brock*, 667 F. 2d 1311, 1318-1322 (9th Cir.) cert. denied No. 81-6922 (Mar. 7, 1983), etc.

*1984* would be handled by the Court when it "should eventually occur." In *Knotts*, this Court noted that it was not encountering "twenty-four hour surveillance", 75 L. Ed. 2d at 63, nor intrusion into "the privacy of one's own quarters", 75 L. Ed. 2d at 62. Now, less than a year later, the Government unabashedly uses arguments identical to those used in *Knotts* to gain justification for five month surveillance involving five private residences and two private storage areas. Cannot this Court see where this juggernaut is headed?

For the first time some members of this Court are attempting to exempt technological advance from the Fourth Amendment, 75 L. Ed. 2d at 63-64,[9] arguing that the Fourth Amendment does not prohibit police efficiency not only stands *Katz* on its head, but states a false argument. If the Government were to develop a directional microphone in the future (if it already has not) which could penetrate the walls of a residence and overhear conversations within, does the expectation of privacy in *Katz* give way to police efficiency? If the Government were to develop a microwave transmitter and receiver in the future (if it already has not) which could penetrate the walls of a dwelling and not only overhear the conversations, but record the movements and actions within, does *Katz* again defer to efficiency? Unless the framers of our Bill of Rights intended that our liberties and private lives would fade away as our technological expertise increased, this is constitutional heresy.

And we have not seen the last of technological advance. The possibility that the Government may one day

---

[9]However, Justice Stevens observed that *Katz* held differently and voiced considerable concern, 75 L. Ed. 2d at 66.

be able to electronically imprint or otherwise tag its citizens and their possessions and monitor their movements simultaneously through computers which already have such capability should be a sobering, if not chilling thought to the members of this Court. If there was any central theme in George Orwell's Magnus Opus it was that if one waits until *1984* to confront *1984* it is much, much too late.

**II. The Writ Of Certiorari Should Not Be Granted Because The Suppression Ordered Is Alternatively Justified Under The District Court's Supervisory Powers.**

**A. The Misleading Nature of the Affidavit.**

Looking into the basis for the District Court's findings that the warrant affidavit was misleading we must review the warrant affidavit. In sum, (1) the affidavit listed Muehlenweg as the target even though he was working for the Government at the time, (RII 169), and even though the Government knew who the true targets were, (RII 170-171, 179); (2) the affidavit listed prior seizures of amphetamines in lockers and in laboratories traced to Muehlenweg even though the Government knew that these seizures had nothing to do with the real targets of the investigation nor with the investigation itself, (RII 167-169); and the affidavit implied that the Government suspected that the ether would be used as a precursor chemical utilized "to manufacture" amphetamines when the Government knew that they were conducting a "cocaine" investigation, (RII 108, 179).

Buried in a footnote in Petitioner's "Statement" is the statement of alleged fact that "the Prosecutor orally ad-advised the issuing Judge" that "Muehlenweg [was an informant]" and also orally advised him that "information had been omitted from the warrant application to

preserve Muehlenweg's confidential informant status," see Pet. 4 at n.3. These alleged facts set the stage for the Government's further declaration, buried in another footnote, to the effect that "because the inaccuracies in the written warrant application were not designed to mislead the magistrate[10] (sic), . . . we believe the District Court erred in invalidating the beeper warrant, . . .," but since the issue was not "preserved on appeal, [it] is not presented here," Pet. 6-7 at n.4.

This is indeed what the Government presented at hearing. It is not what the District Court found as fact. In his oral findings, United States District Judge Gratton declared that:

> Since the government created that situation, that conflict, it's easy to resolve, it goes against the government. I find that the Judge was not told anything outside of the affidavit, if that is material.
>
> (RII 332).

In his written findings, the District Judge stated clearly:

> *It must be made clearly noted that the Court is not finding that the off-the-record statements claimed to have been made by the Assistant United States Attorney and the DEA Agent were in fact made to the issuing Judge.* Such a determination is unnecessary under the law. Were such a determination necessary, however, the Government has, by pursuing this course of action, created the untenable situation where the facts as to what transpired could only be resolved by the testimony or affidavit of the issuing Judge. Indeed in this case the defendants offered to obtain a

---

[10]Actually, the false affidavit was not presented to a "magistrate," but to U. S. District Judge Meacham himself in his own chambers, (RII 208).

> statement or affidavit from the issuing Judge,[11] which offer was refused by the Court. Such a situation cannot even be contemplated, for it would create the impossible situation where one Judge would be called on to pass on the credibility of another. (Emphasis added.)
>
> (RI 15).

The Respondents have always taken a very firm position regarding the misleading nature of the affidavit and its invalidity.[12] Specifically, they would show this Court: (1) That no oral representations were made, (RII 332); (2) that no security interest justified oral representations;[13] (3) that even if oral representations were made, the Government admits that they were unsworn; thus they could not be considered; (RII 171, 246); (4) that even if oral representations were made, they were not recorded or

---

[11]After being surprised by the alleged oral supplementation, Defense Counsel ran across the hall to interview U. S. District Judge Meacham, (RII 287) and returned with a proffer that Judge Meacham did not recall any oral supplementation or explanation of the warrant affidavit, (RI 15).

[12]Contrary to the facts set forth in the Petitioner's Statement, Respondents below filed a specific, sworn Motion to Suppress because of material falsehoods in the warrant, based on facts gleaned from a painstaking defense investigation.

[13]At the District Court hearing, the Government defended its "good faith" bad faith by maintaining that a relative of Muehlenweg worked as a clerk in the U. S. Magistrate's office and that his life would be jeopardized if his identity as an informant was revealed, (RII 234-242). The Respondents reported: (1) that the Government could have designated Muehlenweg in the affidavit as an anonymous confidential informant, (RII 240-242), inasmuch as the DEA or U. S. Attorney's office admitted that they were aware of such a procedure; and (2) that there was no showing that the relative in the Magistrate's office would have had any access to a District Court's *Order* sealed under Order of the Court, (RII 174, 265-266), or that the United States had reason to suspect the relative would be able to gain access, (RII 265-266), or that the relative would have used the information to harm Muehlenweg if he somehow was able to gain access to the sealed document.

transcribed as required by F. R. Cr. P., Rule 41(e) and thus could not be considered; (RII 247-249); (5) that even if oral representations were made in the manner alleged by the Government (a) identifying Muehlenweg as a confidential informant, and (b) explaining that information had been omitted from the affidavit (Pet. 4 at n.3) there still would be no probable cause.[14]

The District Court accurately summed up the affidavit: "putting it bluntly it is as phoney as a three-dollar bill" (RII 332). In this cause, a high-ranking law enforcement officer of the Federal Government together with an assistant United States Attorney, who was an officer of the United States and of the Court intentionally committed an intentional and flagrant violation of not only the Fourth Amendment Commandment, but also the integrity of the District Court. For when their duplicity was uncovered they sought to make the District Court an accomplice in their deeds,[15] as if the District Court would have approved this warrant affidavit with the knowledge that the target was not a target, that the suspicious events recited were not relevant to the investigation at hand, and that the offenses recited were not the ones under investigation. In seeking to do this, they merely damaged themselves further. Judge Bratton declined to accept their story told after class. Viewing the suppression that he

---

[14]If the District Judge accepted the oral explanation that Muehlenweg was an informer and that information was omitted (Pet. 4 at n.3), we would still have the same effect as excising the Muehlenweg portions of the indictment. The Government admits that it did not tell the Judge (1) the names of the real targets (RII 170-171, 179), that it was a cocaine investigation, (RIII 108), that the seizures listed in the affidavit did not concern this investigation (RIII 167-169), etc.

[15]Upon interview by Defense Counsel, District Judge Meachum did not recall extraneous remarks, (RII 287).

knew he had to order, Judge Bratton felt compelled to add: "We do have a very unfortunate situation, not the least of which is that the confidence of the Court and the affidavits that might be presented to it, I would say, is shaken, at a minimum." (RII 331).[16]

**B. The Supervisory Power of the Court.**

The Respondents argued below[17] that if the Fourth Amendment could not be applied to the appalling situation in this cause, then suppression is justified under the Court's supervisory powers. In examining a situation involving blatent intentional misrepresentations in the search warrant affidavit, the Seventh Circuit in *United States v. Cortina,* 630 F. 2d 1207 (7th Cir. 1980) declared:

> Unless officers of the law know that the consequences of deliberate misrepresentations will be the suppression of the evidence, "lawless or reckless misconduct" will not only be encouraged, but invited. *Id.* "The bulwark of the Fourth Amendment protection, of course, is the Warrant Clause, requiring that, absent certain exception, police obtain a warrant from a neutral and disinterested magistrate before embarking upon a search." *Id.,* at 164, 98 S. Ct. 2681. Unless we deter behavior such as Brown's, that bulwark will become a Maginot Line, laughingly circumvented by those sworn to respect it. Courts must act in their own self-defense against brazen violations of their procedures. We must draw the line at misconduct occurring within our own house. *Cortina,* 620 F. 2d 1216-1217.

---

[16]Respondents have dealt with this subject at length here because they seek to justify suppression upon an alternate ground: That the purpose of preserving the Court's integrity demands that this evidence be suppressed under this Court's supervisory powers if it is not suppressible under the Fourth Amendment.

[17]See *Brief for Appellees* (Horton and Harley) at pp. 35-39.

In our case, the situation is even more egregious than was the case in *Cortina,* for in our case the agents of law enforcement are aided and abetted by a United States Attorney. If the District Court cannot reach such conduct then it is a prisoner in its own chambers, see also *Olmstead v. United States,* 277 U. S. 438, 485, 48 S. Ct. 564, 72 L. Ed. 944 (1928); *McNabb v. United States,* 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 2d 819 (1943); *Upshaw v. United States,* 335 U. S. 410, 69 S. Ct. 170, 93 L. Ed. 100 (1948); *Mesarosh v. United States,* 352 U. S. 1, 77 S. Ct. 1, 1 L. Ed. 2d 1 (1956); *Mallory v. United States,* 354 U. S. 449, 77 S. Ct. 1356, 1 L. Ed. 2d 1479 (1957); *Elkins v. United States,* 364 U. S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960).

## CONCLUSION AND PRAYER

If the United States Constitution is seen as extolling the virtues of ordered liberty, then the Bill of Rights must be considered as supporting the view that that Order will tend to order liberty about more and more as the years pass and thus order should itself be restrained in some manner.[18] The central amendments to the Bill of Rights

[18]Comments of Mr. James Madison,

"It appears to me that this House is bound by every motive of prudence, not to let the first session pass over without proposing to the State Legislatures some things to be incorporated into the Constitution, that will render it as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them. I wish, among other reasons by something should be done . . . [toward adopting a Bill of Rights] that those who have been friendly to the adoption of this Constitution may have the opportunity of providing to those who were opposed to it that they were as sincerely de-

(Continued on following page)

attempt to protect a core of rights thought to be crucial to the liberty of the individual against Government's intrusion. Many of these amendments involve or overlap the issue of individual privacy. For example, the First Amendment limits Governmental infringement of "freedom to associate and privacy in one's associations," *N.A.A.C.P. v. Alabama*, 357 U. S. 449, 462, 78 S. Ct. 1163, 2 L. Ed. 2d 1488; the Third Amendment protects the privacy of the home against Governmental peacetime quartering of soldiers; the Fourth Amendment protects those spheres in which a person has a "reasonable expectation of privacy," whether in public or in private, *Katz v. United States*, 389 U. S. 347, 350-353, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); and the *Katz* Court also noted that "the Fifth Amendment too, 'reflects the Constitution's concern for [the right of each individual] to a private sphere where he may lead a private life,'" citing *Tehan v. Shott*, 382 U. S. 406, 416, 86 S. Ct. 459, 15 L. Ed. 2d 453 (1966), *Katz*, 389 U. S. at 350, n. 5.

---

(Continued from previous page)

voted to liberty and a Republican Government, as those who charged them with wishing the adoption of this Constitution in order to lay the foundation of an artistocracy or despotism. It will be a desirable thing to extinguish from the bosom of every member of the community, any apprehensions that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled. And if there are amendments desired of such a nature as will not injure the Constitution, and if they can be ingrafted so as to give satisfaction to the doubting party of our fellow-citizens, the friends of the Federal Government will evince that spirit of deference and concession for which they have hitherto been distinguished. * * * There is a great body of the people falling under this description, who at present feel much inclined to join their support to the cause of Federalism, if they were satisfied on this one point. We ought not to disregard their inclination, but, on principles of amity and moderation, conform to their wishes, and expressly declare the great rights of mankind secured under this Constitution." Gales, *Debates and Proceedings in the Congress of the United States*, Vol. I (Washington: Gales and Seaton 1834), at Col. 448-449.

One of the more crucial elements of this bright line is the Fourth Amendment which "protects individual privacy against certain kinds of Governmental intrusion, but its protections go further . . . ," *Katz*, 389 U. S. at 350.[19] Our forefathers did not intend the Fourth Amendment as a law enforcement facilitation act of 1790-91. Rather, the Fourth Amendment was meant to do exactly what its critics complain that it does, impede and hinder law enforcement. Of course it was not intended to do so for the mere sake of impeding and hindering the forces of order, but rather for the purpose of protecting that private sphere upon which Government may not transgress at will. In considering these deliberate constraints placed upon law enforcement, we must be careful to remember that our founding fathers were intimately familiar with the onerous burden that these brief written passages would place on those charged with maintaining the public order and safety. They knew better than we the dangers posed by granting citizens those rights which would allow many of their private activities to proceed not only unchecked but unmonitored. To this writer's knowledge, no justice sitting on this Court has experienced anything similar to the crucible of momentous events in which their ideas of liberty and order were forged. To this writer's knowledge, no justice sitting today is able to draw on the personal experiences of having conspired to deprive the Government of its duties and tariffs; of having met in secret plotting high treason and insurrection; of

---

[19]Although the merits of some proposed amendments in the Bill of Rights were debated and some actually rejected, the founders were so convinced of rightness and need for the protections of the Fourth Amendment that the debate centered solely upon the wording of the Amendment as against the merits of whether it should or should not be adopted. *Debates*, Vol. I at 783-785.

having stored arms in illegal caches; of having formented rebellion against lawful authority; or of having brought this treason and insurrection into full fruitation, deposing by force the authority that previously had governed them. We have never walked in their footsteps, yet we are charged with the solemn and sworn duty to uphold the very document which was so conceived. It is not an easy task. We can only attempt to remove ourselves from our comparatively complacement and pedestrian existence and to approximate the spirit which gave birth to the Bill of Rights, and specifically the Fourth Amendment. Looking at the Bill of Rights in this light, one is amazed that these former insurrections would endanger their own handiwork by deliberately making our infant Government more vulnerable than the great power that they had just overthrown. Such courage!

We who have received their legacy find ourselves in a nation of unequalled power and plenty, but yet we have been cheated out of a portion of our inheritance. We do not have that courage. Though our nation is a giant among nations, secure in might and wealth, we have grown faint-hearted and timorous in our maturity. The same Government which in its infancy shouldered the burden of the Fourth Amendment and walked steadfastly forward now stands before this Court with its hat in its hand, asking to be relieved of a portion of that burden. This Government pleads that it is weak and vulnerable and that the enemies of order wax strong. This Government finds the threat posed by the problem of drug traffic to be "substantial, if not compelling" (Pet. 15) in the context of Fourth Amendment. Substantial? Compelling? To this writer the problem is as "substantial" as the need of the British Crown to collect its duties on tea and other articles so as

to replenish its nearly bankrupt treasury so that it could continue to hire soldiers and generally provide for the welfare and security of its subjects. Every generation faces its own crises, threats, and challenges. Looking from the birth of nation forward, we see objections to Federal taxes on whiskey developing into actual rebellion; further war with England with our very capitol in flames; civil war which produced conflict and desolation of an unequalled magnitude; a world war; a crusade against alcohol in which law enforcement actually had to admit defeat; another world war; the threat of nuclear holocaust; the problem of drug use and drug traffic; the problem of massive flow of illegal aliens; etc., etc.; to name a few of the threats that we have faced. If we accept the fact that every one of these problems of threats is a "substantial, if not compelling" basis for further reduction in the scope of the Fourth Amendment, then we have accepted the piecemeal repeal of the Fourth Amendment and the only question remaining is the actual date of its final demise. This is because threats, problems, and crises will always be occuring barring the advent of the millenium. If we accept that the crises of each generation justify further diminishment of the Fourth Amendment, then we must accept the fact that we have adopted a course of gradual repeal of the Fourth Amendment by judicial acquiescence to the popular clamor of the moment; and that we are in effect rewriting their work because our generation is not as capable or courageous in facing its problems as were the generations before us, (or else simply feels that it is not). In this regard, we cannot help but note that our founding fathers did not consider the very real threat of further insurrection in a revolution-ravaged land to be so

"compelling" as to defer or delay passage of the Fourth Amendment in 1790-91.[20]

Hand in hand with this fear of "modern problems" we find a growing array of modern devices which in fulfilling their purpose of aiding law enforcement threaten to erase the private sanctuaries of home and office by technological fiat. These devices have been a boon to those who find the Fourth Amendment anachronistic if not dangerous, but yet lack the temerity to suggest outright repeal or avoidance of the amendment. They see clearly and correctly that a mere disinclination against applying the Fourth Amendment to the inroads created almost daily by science will achieve the same result in the end. Thus, the embarrassing rejection of the ideals of our founding fathers can be viewed as a much more palatable acquiescence to "progress." This writer finds this process just as repugnant to the oath which we all take to uphold the Constitution as would be an outright refusal to enforce the Fourth Amendment. Since we have long since accepted the notion that other portions of the Constitution should be expanded and interpreted so that they may encompass modern situations, failure to do so in the case of the Fourth Amendment will amount to intentional repeal. We have in the wealth of this Court's experience and precedent, the tools to adopt the Fourth Amendment to the changing world in which we live. *Katz* is of course the key to devising a solution which would both apply and uphold the Fourth Amendment. There the Government made a major attempt to shield its new technology from

---

[20]See comments of Mr. James Madison, "it appears to me that this house is bound by every motive of prudence, not to let the first session pass without proposing . . .," etc. *Debates*, Vol. I, 448-449, Resp. at n.18, *supra*.

the strictures of the Fourth Amendment, stressing that the device in *Katz* did not penetrate the "protected" enclosure although it was technologically capable of overhearing conversations within. This Court made short work of that argument declaring explicitly that the fact could have "no Constitutional significance," and declaring implicitly that technology would not be allowed to abridge a citizen's reasonable expectation of privacy regardless of the novel method of surveillance or detection utilized, *Katz*, 389 U. S. at 352-354. The Government's arguments in this case that the ether drum is not a protected area, that the privacy of a home is not violated by the presence of a broadcasting device therein, and that an electronic signalling device is only a limited intrusion are mere shades of arguments used and rejected in *Katz*, 389 U. S. 347 at 352, 354 at n. 14.

The Fourth Amendment is there, the tools to apply it to this new technology are there, and the dangers of not applying it are legion. The thoughtful decision of the Tenth Circuit in *Karo* not only follows the true spirit of *Katz*, but is consistent with the controlling precedents of this Court. The Government on the other hand walks into this Court with unclean hands and beseeches this Court to not only overturn *Karo* decision and to diminish the influence of this Court's landmark decision in *Katz*, but also to place a burgeoning area of technology beyond the reach of the Fourth Amendment, and beyond its guarantees of our privacy. The ideals of the Fourth Amendment are only real if we have the courage and diligence to enforce them.[21] And this must be done against all threats, whether

---

[21]Respondents would point to unenforced guarantees of privacy found in various constitutions throughout the world. For example, see *U.S.S.R. Constitution*, Article 55, "Citizens of the U.S.S.R. are guaranteed inviolability of the home," etc.

ancient intrusions or the novel forms created by the inexorable progress of technology. The Respondents pray that this Court enforce the Fourth Amendment in this cause by letting the thoughtful opinion of the United States Court of Appeals stand as it is and by denying certiorari to the Government in this cause.

Respectfully submitted,

WILLIAM MARCHIONDO
*Attorney for Respondent*

RICHARD MILES HORTON
P.O. Box 568
Albuquerque, New Mexico
(505) 247-0751

JOSEPH (SIB) ABRAHAM, JR.
CHARLES LOUIS ROBERTS
*Attorneys for Respondent*

WILLIAM ROBERTSON HARLEY
P.O. Box D
El Paso, Texas 79951-0004
(915) 544-7860

By Charles Louis Roberts

## APPENDIX A

### Oral Decision of the District Court

THE COURT: Thank you very much, counsel. We do have a very unfortunate situation, not the least of which is that the confidence of the Court and the affidavits that might be presented to it, I would say, is shaken, at a minimum. I will just—the Motion to Suppress will be granted and I will give you my reasons why.

Well, a chance to make some law in the Tenth Circuit on various points here, if you want. First of all, as to whether a warrant is needed for a beeper under these circumstances, there is, of course, a split in the circuits on that issue. It has been my feeling straight along, that a beeper is an intrusion; it's a search. It should require a warrant. Government agencies should not be free to just implant them at will. It should come through the normal Fourth-Amendment warrant probable-cause process. And I would say very particularly, so I realize that one circuit, I think the Ninth or somebody—I think the Ninth, saying that it is not an intrusion because it does no more than track something that you could track with the eye, where you plant a beeper in a vehicle or something like that, that it could be followed. Well, five months —you can't—it's not possible to follow around for five months. That's what happened here as a result of having that beeper in there for five months. All told, I think a warrant for a beeper, under these circumstances, was required.

As far as the affidavit, I will say possibly there are not too many outright blatant falsehoods, but as a result of half-truths, innuendos, deliberate attempt to create

an impression other than the actual fact, my view is that the original affidavit, as putting it bluntly, is as phony as a three-dollar bill. And then you have not only that, that it was deliberately conceived to give a false impression, and I might add, a good job was done in that regard. Reading of that affidavit, you come out with a far different impression of the facts than the actual truth.

Now, as to—I don't know that it would make any difference whether or not the affiant or the U. S. Attorney supplied additional information to a Magistrate issuing the affidavit or issuing the warrant, that is a Judge in this case, but under any circumstances, you have a flat conflict in the evidence between the D. E. A. agent and the U. S. Attorney, as to whether or not the Judge was told anything outside of the affidavit. Since the government created that situation, that conflict, it's easy to resolve, it goes against the government. I find that the Judge was not told anything outside of the affidavit, if that is material.

Now, I think the law is clear as far as the probable cause, you can't go outside of the affidavit, the sworn testimony. Just as far as what's right and what's wrong, it presents a terrible situation the government has done and created here.

Now, as far as standing, in my view, the installation of a beeper is a continuing search. It's not just a search when it's put on the can on the loading dock, or wherever, it's a search wherever that can is tracing. And that's the purpose of the whole thing, is to—and as is evident in this case, it did a good job. I say, accordingly, I think each person has standing, has demonstrated standing to challenge, except maybe the Defendant Rotl is the

only one I have a question about in that regard. Everyone else has demonstrated some connection with, or expectation of privacy where the can was intruded. Some have demonstrated ownership or possession of it. But rather than further complicate the situation. I will just grant the motion to suppress as to all of the Defendants.

Now, as to the fact that there might have been additional probable cause developed and shown as the matter went along, that might be so. But I don't think you can cure the ill if it hadn't been for the faulty beginning, it would have lost track of the whole thing right at the start, and the fact that they subsequently developed probable cause, I think, is just a product of the initial improper affidavit and deception of the Court.

Now, in granting the Motion to Suppress, let me—I will just add another thing. I take no—I think there is a great deal to be said for the Chief Justice's view that suppression is not necessarily the answer where the law officials do something improper. The Chief Justice's view that perhaps other solutions such as lawsuits, diciplinary action or other matters are more appropriate where perfectly reliable evidence is developed and then has to be suppressed because of something that has been done wrong, either deliberately or inadvertantly by the law officials. Unfortunately, this was done wrong, deliberately. Whether they thought they were doing wrong or not, they were. Perhaps one of these days the Chief Justice's view will prevail and will not be necessary to suppress reliable evidence because of the errors in malfeasance of the law enforcement officials. Those will be my findings and conclusions. And the order of the Court, the evidence seized at the—all of the evidence seized at

the search of the house in Taos, will be suppressed. That makes it unnecessary, I suppose, to rule on the severance of counts—the other two counts as to the Defendant Karo. It makes it unnecessary to rule as to the Horton confession. That Motion to Suppress will be granted. (RII 331-335)

Office - Supreme Court, U.S.
FILED
MAR 6 1984
CLERK

No. 83-850

# In the Supreme Court of the United States

OCTOBER TERM, 1983

---

UNITED STATES OF AMERICA, PETITIONER

*v.*

JAMES CONNORS KARO, ET AL.

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES

---

REX E. LEE
*Solicitor General*

STEPHEN S. TROTT
*Assistant Attorney General*

ANDREW L. FREY
*Deputy Solicitor General*

ELLIOTT SCHULDER
*Assistant to the Solicitor General*

VINCENT L. GAMBALE
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTIONS PRESENTED

1. Whether warrantless installation of a beeper inside a container of chemicals with the consent of the original owner violates the Fourth Amendment rights of a suspect in a drug manufacturing scheme to whom the container is subsequently transferred.

2. Whether the warrantless monitoring of signals from a beeper installed inside a container of chemicals that law enforcement authorities reasonably believe will be used to manufacture illegal drugs violates the Fourth Amendment when the monitoring occurs while the beeper is located within a home or other private area, such as a commercial storage locker.

## PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Richard Miles Horton, William Robertson Harley, Michael Gaylord Steele, Evan Roth and Gene R. Rhodes were parties to the proceeding in the court of appeals.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Constitutional provision involved | 2 |
| Statement | 2 |
| Summary of argument | 10 |
| Argument | 15 |
| I. The consensual installation of the beeper did not violate respondents' Fourth Amendment rights | 17 |
| II. The monitoring of the beeper did not violate the Fourth Amendment | 23 |
| A. The monitoring of the beeper was not a search or seizure | 23 |
| B. Even if the monitoring of the beeper was a search or seizure, the Fourth Amendment standard of reasonableness was satisfied | 31 |
| 1. The use of a beeper is "reasonable" for Fourth Amendment purposes if it is based on a reasonable suspicion of criminal activity | 31 |
| Conclusion | 46 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861 | 45 |
| *Arkansas* v. *Sanders*, 442 U.S. 753 | 40 |
| *Camara* v. *Municipal Court*, 387 U.S. 523 | 41 |
| *Cardwell* v. *Lewis*, 417 U.S. 583 | 40, 45 |
| *Chambers* v. *Maroney*, 399 U.S. 42 | 40 |
| *Dalia* v. *United States*, 441 U.S. 238 | 19, 41 |
| *Frazier* v. *Cupp*, 394 U.S. 731 | 18 |

Cases—Continued: Page

*Hester* v. *United States*, 265 U.S. 57 ..... 21
*Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983) ..11, 22, 30
*Johnson* v. *United States*, 333 U.S. 10 ..... 41
*Katz* v. *United States*, 389 U.S. 347 ..... 21
*Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 ..... 41
*Michigan* v. *Long*, No. 82-256 (July 6, 1983) ..... 13, 34
*Payton* v. *New York*, 445 U.S. 573 ..... 19
*Smith* v. *Maryland*, 442 U.S. 735 .....18, 23, 24
*Terry* v. *Ohio*, 392 U.S. 1 ..... 33
*Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983) ..... 34
*United States* v. *Abel*, 548 F.2d 591, cert. denied, 431 U.S. 956 ..... 18-19
*United States* v. *Arrendondo-Morales*, 624 F.2d 681 ..... 19
*United States* v. *Bailey*, 628 F.2d 938.....18, 42-43, 44, 45
*United States* v. *Bentley*, 706 F.2d 1498 ..... 44
*United States* v. *Bernard*, 625 F.2d 854..... 18, 44
*United States* v. *Braithwaite*, 709 F.2d 1450 ..... 43-44
*United States* v. *Brock*, 667 F.2d 1311, cert. denied, No. 81-6922 (Mar. 7, 1983) .....18, 30, 44
*United States* v. *Bruneau*, 594 F.2d 1190, cert. denied, 444 U.S. 847 ..... 18
*United States* v. *Cassity*, 720 F.2d 451, petition for cert. pending, No. 83-1393 ..... 42, 43
*United States* v. *Chadwick*, 433 U.S. 1 ..... 40, 41
*United States* v. *Cheshire*, 569 F.2d 887, cert. denied, 437 U.S. 907 ..... 18
*United States* v. *Clayborne*, 584 F.2d 346 ..... 44
*United States* v. *Conroy*, 589 F.2d 1258, cert. denied, 444 U.S. 831 ..... 19
*United States* v. *Curtis*, 562 F.2d 1153, cert. denied, 439 U.S. 910 ..... 18
*United States* v. *Devorce*, 526 F. Supp. 191, aff'd *sub nom. United States* v. *Lombardo*, 697 F.2d 299, cert. denied, No. 82-5459 (Mar. 7, 1983)..... 19
*United States* v. *Dubrofsky*, 581 F.2d 208 ..... 26
*United States* v. *Dunn*, 674 F.2d 1093 ..... 44
*United States* v. *Ellery*, 678 F.2d 674, cert. denied, 459 U.S. 868 ..... 44
*United States* v. *Hufford*, 539 F.2d 32, cert. denied, 429 U.S. 1002 ..... 19, 44

Cases—Continued: Page

*United States* v. *Knotts*, 662 F.2d 515, rev'd, No. 81-1802 (Mar. 2, 1983) ..... 19
*United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983) ..... *passim*
*United States* v. *Lee*, 274 U.S. 559 ..... 23
*United States* v. *Lewis*, 621 F.2d 1382, cert. denied, 450 U.S. 935 ..... 18
*United States* v. *Martinez-Fuerte*, 428 U.S. 543..33, 34, 36
*United States* v. *Matlock*, 415 U.S. 164 ..... 18
*United States* v. *Mendenhall*, 446 U.S. 544 ..... 35
*United States* v. *Michael*, 645 F.2d 252, cert. denied, 454 U.S. 950 ..... 19, 37-38
*United States* v. *Miroyan*, 577 F.2d 489, cert. denied, 439 U.S. 896 ..... 18
*United States* v. *Moore*, 562 F.2d 106, cert. denied, 435 U.S. 926 ..... 19
*United States* v. *Noll*, 600 F.2d 1123 ..... 44
*United States* v. *Place*, No. 81-1617 (June 20, 1983) ..... 11, 30, 34
*United States* v. *Pretzinger*, 542 F.2d 517 ..... 19
*United States* v. *Sheikh*, 654 F.2d 1057, cert. denied, 455 U.S. 991 ..... 25-26
*United States* v. *Shovea*, 580 F.2d 1382, cert. denied, 440 U.S. 908 ..... 19
*United States* v. *Stephenson*, 490 F. Supp. 619..... 44
*United States* v. *Taylor*, 716 F.2d 701 ..... 43
*United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983) ..... 13, 35

Constitution and statutes:

U.S. Const. Amend. IV ..... *passim*
Warrant Clause ..... 14, 46
18 U.S.C. 2518(8)(d) ..... 4
21 U.S.C. 841(a)(1) ..... 2
21 U.S.C. 846 ..... 2

Miscellaneous:

1 W. LaFave, *Search and Seizure* (1978) ..... 46

# In the Supreme Court of the United States

OCTOBER TERM, 1983

---

No. 83-850

UNITED STATES OF AMERICA, PETITIONER

*v.*

JAMES CONNORS KARO, ET AL.

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 710 F.2d 1433. The district court's oral ruling granting respondents' joint suppression motion (J.A. 155-158) is not reported. The memorandum opinion of the district court denying the government's motion for reconsideration (Pet. App. 16a-22a) is not reported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 23a) was entered on June 20, 1983. A petition for

rehearing was denied on August 26, 1983 (Pet. App. 24a). Justice White extended the time within which to file a petition for a writ of certiorari to and including November 24, 1983. The petition was filed on November 22, 1983, and was granted on January 16, 1984 (J.A. 159). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT

In an indictment filed in the United States District Court for the District of New Mexico, respondents were charged with conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. Respondents Horton, Harley, Steele and Roth were also charged with possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). In addition, the indictment charged respondent Karo with possession of cocaine with intent to distribute it and distribution of cocaine, both in violation of 21 U.S.C. 841(a)(1). J.A. 32-34.

1. Prior to trial, respondents filed a joint motion to suppress evidence seized in a warrant-authorized search of a house in Taos, New Mexico. J.A. 35-41. Respondents contended that the search warrant for the Taos residence was invalid because it was based

on information derived from allegedly unlawful beeper surveillance.

The evidence at the suppression hearing showed that on March 3, 1980, in Albuquerque, New Mexico, Drug Enforcement Administration (DEA) agents conducted a judicially authorized search of a storage locker rented by Richard Logan and discovered laboratory equipment, glassware and chemicals used to manufacture amphetamine. Some of the boxes containing laboratory equipment and chemicals bore shipping labels addressed to Carl Muehlenweg of Graphic Photo Design in Albuquerque. J.A. 69-70, 114-115, 150. Approximately six weeks later, DEA agents executed search warrants at Graphic Photo Design, which turned out to be Muehlenweg's residence, and at T & M Research, where Muehlenweg worked. At those locations, the agents discovered invoices and statements reflecting that Muehlenweg had ordered and obtained laboratory glassware and chemicals that had been found in Logan's locker. J.A. 70, 112.

Shortly thereafter, Muehlenweg acknowledged to the DEA that Logan had ordered chemicals and laboratory glassware through him, and he agreed to become a DEA informant. J.A. 67, 100, 114, 151.[1] Muehlenweg also apprised the agents that he had previously ordered ether for respondents Karo, Horton, and Harley for their use in the production of cocaine. In late August 1980, Muehlenweg told DEA Agent Richard Rottinger that he had ordered a 50-gallon shipment of ether for Karo, Horton, and Harley,

---

[1] A few weeks later, after being tipped off by Muehlenweg, agents observed Logan pick up chemicals and equipment from Muehlenweg, but Logan shot and killed himself when the agents moved in to arrest him (J.A. 89, 100, 115, 151-152).

which they planned to use to extract cocaine from clothing that had been imported into the United States. J.A. 99-103, 118, 122-123, 140. Agent Rottinger confirmed that Muehlenweg had ordered and paid for ten five-gallon cans of ether from BWR Scientific, Inc., for delivery in September 1980. J.A. 70-72, 107-109.

Prior to the arrival of that shipment, the government obtained a court order authorizing the installation and monitoring of a beeper[2] in one of the cans of ether that had been ordered by Muehlenweg.[3]

---

[2] "A beeper is a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver." *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983), slip op. 1.

[3] The affidavit in support of the application for the beeper authorization order falsely indicated that Muehlenweg was a target of the DEA investigation relating to the ether shipment, and did not state that he was cooperating with the DEA as a confidential informant (J.A. 43-44). According to the testimony of the prosecutor involved, the affidavit was drafted in that manner in order to preserve Muehlenweg's usefulness as a confidential informant and to protect his safety in the event the targets of the investigation obtained copies of the warrant application. J.A. 130-133, 139. The prosecutor was concerned that the targets might ultimately obtain the application if the district court adopted target notification procedures analogous to those contained in the federal wiretap statute, 18 U.S.C. 2518(8)(d) (J.A. 133-134). The prosecutor and Agent Rottinger testified, however, that at the time the application was made, the prosecutor orally advised the issuing judge that Muehlenweg was actually cooperating in the investigation, and that he explained to the judge that that information had been omitted from the warrant application to preserve Muehlenweg's confidential informant status (J.A. 127, 133, 137-138).

With Muehlenweg's permission, the DEA picked up the shipment from the common carrier, substituted a can containing a beeper for one of the cans in the shipment, repainted the cans so that they would all look alike, and then delivered them to Muehlenweg's residence. J.A. 72-75. ~~H. Tr. 48-54.~~ On September 20, 1980, agents observed respondent Karo pick up the ether from Muehlenweg's house and, using visual and beeper surveillance, followed Karo as he transported the ether in Muehlenweg's automobile to his residence. Still under surveillance, Karo then returned the automobile to Muehlenweg's residence. Pet. App. 4a; J.A. 53-54, 75-76, 120.

By monitoring the beeper later that day, the agents ascertained that the ether had been transferred to the vicinity of respondent Horton's house. The ether's presence at that location was confirmed by a DEA agent who walked along the sidewalk and smelled the odor of ether emanating from Horton's residence. Pet. App. 4a-5a; J.A. 54, 76, 120-121. Subsequent monitoring of the beeper two days later, on September 22, 1980, revealed that the ether had been moved to the home of Horton's father. The following day, the agents traced the ether by means of the beeper to a commercial self-storage facility in Albuquerque. The beeper did not enable the agents to identify the particular locker that contained the chemical; however, the agents detected the odor of ether emanating from locker 143 and ascertained that respondents Horton and Harley had rented that locker. On October 8, 1980, the agents obtained an order authorizing installation of an entry tone alarm in that locker. During installation of the alarm on the following day, the agents saw the cans of ether inside the locker. The alarm malfunctioned, however, and

the agents did not learn that the ether had been removed by respondent Horton until October 16, 1980, when they were so notified by the manager of the storage facility. Pet. App. 5a; J.A. 54-55, 76-78, 80-86, 121-122, 128.

Three days later, on October 19, the agents picked up the beeper signal at another self-storage facility in Albuquerque. With the permission of the storage facility's manager, the agents installed a closed circuit video camera that was focused on the door of locker 15, which had been rented under an alias by respondents Horton and Harley. On December 31, 1980, agents monitoring the camera observed Horton and Harley enter the locker, and on February 6, 1981, they observed respondent Rhodes and an unidentified woman remove the cans of ether and load them into Horton's pickup truck. By means of both visual and beeper surveillance, agents followed the truck to Rhodes's residence, where it was parked in the driveway. Pet. App. 5a-6a; J.A. 55-57, 86-94, 96-97, 110-111.

Later that day, DEA agents followed the truck containing the ether to a residence in Taos, New Mexico rented by respondents Horton, Harley, and Steele. During their surveillance of the Taos residence, the agents monitored the beeper to determine its continued presence at the house. Pet. App. 6a; J.A. 57-58. Relying on information obtained in the course of their investigation, including information derived through the use of the beeper regarding the various locations to which the ether had been transported, the agents secured a search warrant for the Taos residence (J.A. 46-47). On February 10, 1981, the warrant was executed, cocaine and laboratory equipment were seized, and respondents Horton, Harley, Steele,

and Roth were arrested. Pet. App. 6a; J.A. 48, 63, 65. The ether thus had been moved to seven different locations over a period of four and a half months before respondents were finally ready to put it to its intended illicit use.

2. The district court granted respondents' motion to suppress the evidence seized at the Taos residence (Pet. App. 25a). The court concluded that the order authorizing the installation of the beeper was invalid because the government had made deliberate misrepresentations in the warrant application, and that the evidence in question was the fruit of the improperly authorized beeper surveillance (J.A. 155-158). Thereafter, the district court denied the government's motion to reconsider its suppression ruling, rejecting the argument that the installation and monitoring of the beeper did not require a warrant (Pet. App. 16a-22a, 26a).

3. On appeal, the government did not challenge the district court's finding that the order authorizing the beeper was invalid (Pet. App. 3a). Rather, the government contended that the Fourth Amendment does not require a warrant for the installation and monitoring of a beeper, that the defendants lacked "standing" to contest the use of the beeper, and that the evidence seized pursuant to the search warrant for the Taos residence was not the "fruit" of the beeper surveillance.

The court of appeals affirmed the suppression order except as to respondent Rhodes (Pet. App. 1a-15a).[4] At the outset, the court rejected the argument

[4] The court held that Rhodes, who transported the ether from Albuquerque to Taos, failed to establish that his legitimate expectations of privacy had been violated by the beeper surveillance or the search of the Taos residence (Pet. App. 14a-15a).

that the defendants could not have had any legitimate expectations of privacy in the can of ether because the ether was intended for use in the manufacture of contraband (*id.* at 3a-4a). The court then concluded (*id.* at 6a-9a) that respondent Karo's Fourth Amendment rights were violated at the time he picked up the can of ether from Muehlenweg because the installation of the beeper in the can had not been authorized by a valid warrant. The court explained (*id.* at 7a-9a (footnotes and citation omitted)):

> Although the physical installation of the beeper in the can takes place before the new owner picks it up, we believe an intrusion occurs at the time the item comes into his possession. All individuals have a legitimate expectation of privacy that objects coming into their rightful ownership do not have electronic devices attached to them, devices that would give law enforcement agents the opportunity to monitor the location of the objects at all times and in every place that the objects are taken, including inside private residences and other areas where the right to be free from warrantless government intrusion is unquestioned. * * * The installation of a beeper on an item of personal property gives the government the capability of tracing every movement of the object on which the beeper is placed. * * * We believe that individuals have a reasonable and legitimate expectation that the government will not engage in such activity without the protections afforded by resort to the judicial process. Thus, regardless of the consent obtained when the beeper is physically installed, an infringement of the new owner's Fourth Amendment rights begins at the time the object comes into his control. The consent of the owner

> to have a beeper installed cannot suffice to continue the installation once the item belongs to someone else any more than the consent of a previous owner of a suitcase could suffice to permit the police to periodically open and search the suitcase after it comes under the ownership of another.

The court of appeals also held that the monitoring of the beeper without a valid warrant violated the Fourth Amendment (Pet. App. 9a-11a). It sought to distinguish this Court's decision in *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983), on the following grounds: that here the beeper was monitored while the can was inside private premises and storage lockers, whereas in *Knotts* the beeper was never monitored while it was inside a residence; that, unlike in *Knotts*, the monitoring here gave the agents information they could not have discovered even by constant visual surveillance; that the surveillance in *Knotts* lasted only a short time, whereas here it covered a five-month period; and that here, unlike in *Knotts*, the officers lost track of the can for substantial periods of time and much of the tracing of the ether to new locations was possible only by use of the beeper. Pet. App. 9a-10a. The court concluded (*id.* at 10a) that "the warrantless use of a beeper to monitor the location of noncontraband withdrawn from public view inside private residences or similarly protected places is an unconstitutional search or seizure."[5]

---

[5] Rejecting the argument that the evidence seized pursuant to the search warrant for the Taos residence was not the fruit of any illegal beeper surveillance, the court of appeals found a direct link between the beeper monitoring and the information that the ether was at the Taos residence (Pet. App. 11a-12a). The court noted (*id.* at 14a n.6) that even

## SUMMARY OF ARGUMENT

### I

The court of appeals held that the warrantless installation of a beeper inside a container violates the Fourth Amendment rights of a subsequent owner (such as respondent Karo) to whom the container is transferred. The court did not actually conclude—nor could it—that the physical act of placing a beeper inside a container with the consent of the original owner infringes the new owner's legitimate privacy interests. Instead, the court reasoned that the continued presence of the beeper inside the container after its transfer to the new owner is a search or seizure within the contemplation of the Fourth Amendment because the beeper "gives the government the capability of tracing every movement of the object on which the beeper is placed" (Pet. App. 7a).

This holding is wholly untenable. The applicability of the Fourth Amendment to a particular law

---

though there were breaks in the monitoring between the initial delivery of the ether to Karo and the tracking of the ether to Taos, there was no break between the monitoring of the beeper while it was in the second storage locker and its transfer to the Taos residence.

In addition, the court rejected the argument that respondent Roth (who was a visitor at the Taos residence and had stayed there for several days prior to the search) and Karo (who had no connection with that residence, but whose rights allegedly were infringed by the installation of the beeper) lacked "standing" to seek suppression of the evidence (Pet. App. 13a-14a).

We have not raised these fruits and "standing" issues in this Court. We note, however, that rejection of the court of appeals' holding on the installation issue would establish that there was no violation of respondent Karo's Fourth Amendment rights and require reversal of the judgment in his favor. See pages 17-23, *infra*.

enforcement action turns on whether that action has infringed the legitimate expectations of privacy of the person challenging it. See, *e.g.*, *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983); *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 10-11; *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983). It is clear that the intrusion, if any, into legitimate privacy expectations occasioned by beeper surveillance occurs only when signals from a beeper are monitored to ascertain the location of the container in which it has been installed. The beeper's mere presence inside the container, without more, provides no information whatever, and thus effects no intrusion into the new owner's privacy interests.

## II

The court of appeals also held that the warrantless monitoring of the beeper while it was located inside private premises violated respondents' Fourth Amendment rights. In reaching this result, however, the court disregarded the fact that the only information conveyed by a beeper—*viz.*, its present location—intrudes minimally, if at all, upon protected privacy interests. The limited nature of the information disclosed by a beeper is of critical importance in determining whether the use of the beeper in the circumstances of this case implicated the Fourth Amendment and, if so, whether the beeper surveillance was reasonable under the Fourth Amendment.

A. This Court's decision in *Knotts* establishes that the use of a beeper to monitor the movement of a container from one location to another does not disclose information as to which there is a legitimate expectation of privacy, even though each location may itself be private premises, because the actual move-

ment—which is all that the beeper reveals—takes place over public roads and thus is subject to discovery through visual surveillance. Moreover, when monitored from a distance (which is often the case as agents seek to avoid detection), a beeper discloses only that it is somewhere in the vicinity of a particular structure, without revealing whether it has been taken inside. And even when a beeper does disclose its presence inside private premises, it tells nothing about the interior of those premises other than the fact that it is there. Whether the suspects take the beeper-laden container inside private premises, as here, or leave it outside, as in *Knotts*, the information garnered by monitoring the signal is the same: that the container has been taken to a particular location. This case and *Knotts* are therefore analytically indistinguishable.

B. The Fourth Amendment imposes two separate requirements on law enforcement activities. First, the Amendment declares that the right to be free from unreasonable searches and seizures shall not be violated. Second, the Amendment states that all warrants must be supported by probable cause and must particularly describe the place to be searched and the persons or things to be seized. Assuming the applicability of the Fourth Amendment to use of a beeper such as was made in this case, it remains necessary to decide what level of information is required to render the "search" affected by a beeper reasonable, and whether, if probable cause is required, it is nevertheless reasonable to conduct such surveillance without first procuring a warrant.

1. It is our submission that if the monitoring of a beeper be deemed a "search," it is so minimally intrusive into legitimate privacy interests, and at the

same time so useful to enforcement of the laws, that it is reasonable under the Fourth Amendment when employed by officers possessing a reasonable suspicion of criminal activity. This Court has recognized that certain law enforcement actions that qualify as Fourth Amendment searches and seizures nevertheless are not so intrusive as to require probable cause. See, *e.g.*, *Michigan* v. *Long*, No. 82-256 (July 6, 1983); *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983). In determining the reasonableness of such actions in particular contexts, the Court has balanced the public interest against the individual's Fourth Amendment interest.

In the context of this case, because the societal concern for drug abuse and the effectiveness of beepers as an aid to drug law enforcement outweigh the limited intrusion on privacy interests occasioned by the use of a beeper, use of this investigative technique is reasonable on less than probable cause. The public interest in investigating and uncovering unlawful drug activity is substantial, if not compelling, and the difficulties of law enforcement are particularly acute in the context of unlawful drug manufacturing ventures such as the clandestine drug laboratory in this case. On the other hand, the use of a beeper, which conveys only a narrow piece of information (its present location), constitutes a sharply limited invasion, if any, on an individual's legitimate privacy interests. In this respect a beeper "search" is dramatically different from a conventional search of the kind that must be justified by probable cause.

2. If reasonable suspicion is sufficient to justify use of a beeper, it follows that the Fourth Amendment does not require a warrant, which may be issued only on probable cause. Even if probable cause is re-

quired before beeper surveillance may be undertaken —and probable cause was clearly present here—the court of appeals erred in imposing a warrant requirement.

Neither the language nor the history of the Fourth Amendment reflects any intention to require warrants as a condition to a lawful search or seizure. Nevertheless, the Amendment does require that searches and seizures be reasonable, and this Court has held that most types of searches may not ordinarily be deemed reasonable unless authorized by a warrant issued by a neutral and detached magistrate and satisfying the prerequisites of the Warrant Clause of the Fourth Amendment. But exceptions to the warrant requirement have been recognized in certain situations in which, after balancing the intrusion into individual privacy interests against societal law enforcement interests, the Court has concluded that the costs of obtaining a warrant outweigh the justifications for seeking antecedent judicial control of the search.

In short, the issue whether a particular type of search must be supported by a warrant in order to be reasonable under the Fourth Amendment cannot be decided without consideration of the magnitude of the individual privacy interest implicated. Given the extremely limited intrusion into legitimate privacy expectations entailed by the monitoring of a beeper, which is not comparable to the intrusions that accompany traditional searches, we submit that the reasonableness of beeper monitoring should not turn on whether it was authorized by a warrant. Indeed, the policies served by a warrant in protecting the interests of the individual against unreasonable governmental intrusion have little, if any, application in the beeper context. The availability of post-search judi-

cial review is adequate to control potential abuses arising from the slight intrusion entailed by beeper surveillance.

## ARGUMENT

Last Term, in *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983), this Court held that the use of a beeper by law enforcement officers to trace a can of chemicals from its place of purchase in Minneapolis to the defendant's residence in a secluded area of Wisconsin did not violate the defendant's legitimate expectations of privacy and thus did not constitute a "search" or "seizure" within the meaning of the Fourth Amendment. The officers in *Knotts* arranged with the chemical company to have the chemicals placed inside a can containing a beeper prior to delivery to one of Knott's confederates. The can was transferred to a second confederate, Petschen, who transported it in his automobile over public roads. By monitoring the beeper's signals, the officers were able to ascertain that the can of chemicals had come to rest on Knotts' property.

The Court in *Knotts* recognized that cases involving the permissibility of beeper use ordinarily raise two distinct issues, one relating to the installation of the beeper in a package or conveyance, the other relating to the monitoring of signals transmitted by the beeper. The Court did not pass on the installation issue, however, because Knotts did not challenge the warrantless installation of the beeper in his case. *Knotts*, slip op. 3 n.*; see also *id.* at 1 (Brennan, J., concurring); *id.* at 1 (Stevens, J., concurring). As to the monitoring issue, the Court concluded that, because visual surveillance from public places would have sufficed to reveal to the police the same information disclosed by the beeper—*viz.*, that Petschen's automobile carrying

the can of chemicals had arrived on Knotts' property —Knotts could claim no legitimate expectation of privacy with respect to that information and thus he could not invoke the protections of the Fourth Amendment.

In this case, the agents obtained a warrant authorizing the installation and monitoring of a beeper in a can of chemicals prior to delivery to respondent Karo. Because the district court held the beeper warrant invalid and the government did not challenge that holding on appeal, the validity of that warrant is not before the Court. Accordingly, the beeper surveillance should be viewed as if it had been undertaken without a warrant. So viewed, the questions for decision are whether the warrantless installation and monitoring of the beeper violated respondents' Fourth Amendment rights in the circumstances of this case.

In the decision under review, the court of appeals held that the warrantless installation of a beeper in a container with the consent of the original owner amounts to a search or seizure that infringes the new owner's Fourth Amendment rights at the time the container comes into his possession. The court also held that the warrantless monitoring of a beeper's signals violates the Fourth Amendment whenever, at the time of monitoring, the container in which the beeper has been installed is situated inside a home or other "private" area. This approach, under which the limited kind of information acquired through use of a beeper is treated no differently from the search of a home, trivializes the values underlying the Fourth Amendment and offends the central policy of reasonableness by which searches and seizures are intended to be regulated. For the reasons set forth below, we contend that both of the court's holdings are in error.

## I. THE CONSENSUAL INSTALLATION OF THE BEEPER DID NOT VIOLATE RESPONDENTS' FOURTH AMENDMENT RIGHTS

Beepers are principally used by law enforcement authorities in drug investigations to uncover illegal trafficking and manufacturing schemes. For example, beepers have enabled government agents to apprehend airborne drug smugglers, to monitor controlled deliveries of packages containing contraband, or, as in this case and *Knotts*, to locate clandestine drug laboratories. Agents have installed beepers on or in conveyances, such as airplanes or automobiles, and inside packages, including those that contain contraband and those containing noncontraband chemicals used to manufacture illegal drugs.

This case is typical of those cases involving the installation of a beeper in a can of noncontraband chemicals. The agents first prepared a can by installing a beeper in it, and then, with informant Muehlenweg's permission, they substituted their own beeper-laden can for one of the cans in the shipment. In our view, neither the physical act of attaching a beeper to a container nor the subsequent act of placing chemicals in the beeper-laden container constitutes a search or seizure at all, at least with respect to a purchaser (such as respondent Karo) to whom the container is subsequently transferred, because neither act intrudes upon any legitimate expectation of privacy that such a purchaser may have. At the time of the installation in this case, the DEA agents already knew that Muehlenweg had ordered ten five-gallon cans of ether on behalf of respondents Karo, Horton, and Harley. By taking Muehlenweg into their confidence, these respondents had assumed the risk that Muehlenweg would convey that information to others, including

the government. See *Smith* v. *Maryland*, 442 U.S. 735, 743-744 (1979) (and cases cited). And the process of pouring a quantity of ether from one of the cans in the shipment into the DEA's own beeper-laden can provided the agents with no additional information that respondents could have wished to keep private.

Moreover, even if the installation of a beeper in these circumstances could be classified as a search or a seizure, there can be no serious Fourth Amendment claim where, as here, the installation is undertaken with the consent of a person having lawful dominion and control over the container. See *United States* v. *Matlock*, 415 U.S. 164, 169-172 (1974); *Frazier* v. *Cupp*, 394 U.S. 731, 740 (1969). Here, Muehlenweg apparently was designated by Karo, Horton, and Harley to order the ether, to pick up the shipment from the common carrier, and to store the ether at his residence until Karo could come by for it. Thus, it is clear that Muehlenweg had a "sufficient relationship" to the property (*United States* v. *Matlock*, 415 U.S. at 171) to consent to the installation of the beeper.[6]

---

[6] We note that several courts of appeals have approved warrantless beeper installations in circumstances similar to those of this case. See *United States* v. *Brock*, 667 F.2d 1311, 1319 n.4 (9th Cir. 1982), cert. denied, No. 81-6922 (Mar. 7, 1983); *United States* v. *Bailey*, 628 F.2d 938, 943 (6th Cir. 1980); *United States* v. *Bernard*, 625 F.2d 854, 860 (9th Cir. 1980); *United States* v. *Lewis*, 621 F.2d 1382, 1388 (5th Cir. 1980), cert. denied, 450 U.S. 935 (1981); *United States* v. *Bruneau*, 594 F.2d 1190, 1194 (8th Cir.), cert. denied, 444 U.S. 847 (1979); *United States* v. *Miroyan*, 577 F.2d 489, 493 (9th Cir.), cert. denied, 439 U.S. 896 (1978); *United States* v. *Cheshire*, 569 F.2d 887, 889 (5th Cir.), cert. denied, 437 U.S. 907 (1978); *United States* v. *Curtis*, 562 F.2d 1153, 1156 (9th Cir. 1977), cert. denied, 439 U.S. 910 (1978); *United States*

The court of appeals in this case did not hold otherwise. Indeed, the court acknowledged that "[b]efore Karo took control of the ether, the can with the beeper

---

v. *Abel*, 548 F.2d 591, 592 (5th Cir.), cert. denied, 431 U.S. 956 (1977); *United States* v. *Hufford*, 539 F.2d 32, 34 (9th Cir.), cert. denied, 429 U.S. 1002 (1976); *United States* v. *Knotts*, 662 F.2d 515, 517 n.2 (8th Cir. 1981), rev'd on other grounds, No. 81-1802 (Mar. 2, 1983); *United States* v. *Devorce*, 526 F. Supp. 191, 199-200 (D. Conn. 1981), aff'd *sub nom. United States* v. *Lombardo*, 697 F.2d 299 (2d Cir. 1982) (table), cert. denied, No. 82-5459 (Mar. 7, 1983).

In analogous contexts, courts have also held that no Fourth Amendment rights are infringed by the warrantless attachment of a beeper on property by an invitee (*United States* v. *Arredondo-Morales*, 624 F.2d 681, 684-685 (5th Cir. 1980); *United States* v. *Conroy*, 589 F.2d 1258, 1264 (5th Cir.), cert. denied, 444 U.S. 831 (1979)), or by the installation of a beeper on the exterior of a car or airplane parked in a location accessible to the public (*United States* v. *Michael*, 645 F.2d 252, 258 (5th Cir.) (en banc), cert. denied, 454 U.S. 950 (1981); *United States* v. *Shovea*, 580 F.2d 1382, 1388 (10th Cir. 1978), cert. denied, 440 U.S. 908 (1979); *United States* v. *Moore*, 562 F.2d 106, 111-112 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978); *United States* v. *Pretzinger*, 542 F.2d 517, 520 (9th Cir. 1976)).

Where it is necessary for agents to enter private premises surreptitiously to install or repair a beeper, however, the Fourth Amendment of course requires the entry to be authorized by a warrant. See *Dalia* v. *United States*, 441 U.S. 238, 246-248 (1979). But the requirement of a warrant in such circumstances has nothing to do with the physical act of installing a beeper, or with the nature of the information disclosed by the beeper if and when it is subsequently monitored. Instead, a warrant is required because any entry by police into a home or similar private premises—regardless of the purpose for that entry—necessarily involves a search of an area in which an individual has a legitimate expectation of privacy. See *Payton* v. *New York*, 445 U.S. 573 (1980).

was the property of the DEA and the ether was the property of Muehlenweg. At that time, the DEA and Muehlenweg presumably could do with the can and ether whatever they liked without violating Karo's rights" (Pet. App. 7a). The court held, however, that "regardless of the consent obtained when the beeper is physically installed, an infringement of the new owner's Fourth Amendment rights begins at the time the object comes into his control" (*id.* at 8a (footnote omitted)). In so holding, the court observed that "[t]he installation of a beeper on an item of personal property gives the government the capability of tracing every movement of the object on which the beeper is placed," and it expressed the belief that "individuals have a reasonable and legitimate expectation that the government will not engage in such activity without the protections afforded by resort to the judicial process" (*id.* at 7a-8a).

The court of appeals' holding is plainly incorrect. As is evident from the court's own discussion of the installation issue, the intrusion, if any, into legitimate expectations of privacy occasioned by beeper surveillance occurs when a beeper is *monitored* to ascertain the location of the container in which it has been installed. Unless the beeper is activated and its signals monitored, the beeper tells nothing about the whereabouts of the container. Thus, even after the transfer of a beeper-laden container to a new owner, the continued presence of the beeper, standing alone, cannot be said to effect any intrusion into the new owner's legitimate expectations of privacy. Perhaps the beeper's continued presence after transfer of the container to a new owner constitutes a technical trespass, but, as this Court recently concluded in *Knotts* (slip op. 9), such "notions of physical trespass based on the

law of rea' property" are not dispositive in this context. On the contrary, "the Fourth Amendment's reach 'cannot turn upon the presence or absence of a physical intrusion into any given enclosure.'" *Knotts*, slip op. 4 (quoting from *Katz* v. *United States*, 389 U.S. 347, 353 (1967)). See *Hester* v. *United States*, 265 U.S. 57 (1924). In short, although the court of appeals was correct in its observation that the installation of a beeper provides the authorities with the "capability" of monitoring the movements of a container and of persons possessing the container—just as the possession of a crowbar provides them with the capability of breaking down the doors of a house—the fact remains that, unless that capability is actually utilized, there can be no colorable claim that Fourth Amendment interests are implicated. Indeed, under *Knotts*, even if a beeper's signals are monitored, that monitoring ordinarily will not implicate Fourth Amendment concerns.[7]

The court of appeals sought to justify its holding by analogy to a previous owner of a suitcase consenting to subsequent searches of the suitcase (Pet. App. 8a-9a). This analogy is entirely inapposite. An owner of a container such as a suitcase ordinarily has a legitimate expectation of privacy in the contents of the container, and a search of the container would clearly intrude upon those privacy expectations even if the container's previous owner had consented to a subsequent search. By contrast, a beeper discloses no

---

[7] Thus, the court of appeals' reference (Pet. App. 7a-8a) to an individual's "reasonable and legitimate expectation" that the government will not install and monitor beepers "without the protections afforded by resort to the judicial process" simply begs the question whether the individual's legitimate privacy expectations have been infringed by such actions.

information about the container's contents that was not already known to the agents when the beeper was installed, and it discloses nothing about what a third party might have taken from or placed into the container after it came into his possession. Cf. *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983). Indeed, the beeper discloses nothing at all unless it is monitored, and even then, it discloses only the present location of the container. As the Court held in *Knotts*, however, there is no legitimate expectation of privacy with respect to this information, at least where—as is usually the case—the container's location could have been ascertained by visual surveillance.

Here, respondent Karo certainly had no greater privacy interest in the location of the container than did the defendant in *Knotts*. There, the beeper was used to ascertain the arrival of a can of chemicals on the defendant's premises. Because this same information could have been obtained through constant visual surveillance, the Court concluded that the use of the beeper did not implicate Fourth Amendment concerns. In this case, insofar as respondent Karo is concerned, the beeper revealed only that Karo transported the container of ether in Muehlenweg's automobile from Muehlenweg's residence to his own home. As was the case in *Knotts*, this same information could have been obtained by direct visual surveillance. Moreover, as the court of appeals itself acknowledged (Pet. App. 13a), Karo could not establish a legitimate expectation of privacy in the locations at which the beeper was monitored after it left his house, including the Taos residence where the warrant-authorized search uncovered an illicit drug manufacturing laboratory. The court nevertheless concluded that Karo could move to suppress the evidence seized from that

residence by virtue of his challenge to the installation of the beeper (*id.* at 14a; see also *id.* at 6a n.1).

Under the ruling below, therefore, even where a defendant's legitimate expectations of privacy have not been infringed by beeper monitoring, the defendant may still object to the use of the beeper by challenging its installation. If this Court accepts that view, the result would be to subject every instance of beeper surveillance to regulation under the Fourth Amendment. As a consequence, the decision in *Knotts* would be a dead letter except in those cases in which the defendant's lawyer fails to object to installation of the beeper.

## II. THE MONITORING OF THE BEEPER DID NOT VIOLATE THE FOURTH AMENDMENT

### A. The Monitoring Of The Beeper Was Not a Search Or Seizure

As this Court made clear in *Knotts*, not all surveillance techniques employed by the police implicate Fourth Amendment concerns. In holding that the beeper monitoring in that case did not constitute a search or seizure, the Court analogized the use of the beeper to the use of the searchlight in *United States* v. *Lee*, 274 U.S. 559 (1927), and to the use of the pen register in *Smith* v. *Maryland*, *supra*. *Knotts*, slip op. 6-7. Responding to Knotts' claim that the beeper surveillance violated the privacy interests he enjoyed in his residence, the Court pointed out that the beeper furnished the officers with no more information about the container's location than they could have obtained through visual observation of Petschen's automobile arriving on Knotts's property. The beeper's use therefore "raise[d] no constitutional issues which visual surveillance would not also raise." *Id.* at 9.

Under the teaching of *Knotts*, the use of a beeper to monitor the movement of a container from one location to another does not disclose information as to which there is a legitimate expectation of privacy, even though each location may itself be private premises, because the actual movement—which is all that the beeper reveals—takes place over public roads and thus is subject to discovery through visual surveillance. The fact that the agents may have relied on the beeper rather than on visual surveillance to acquire that information "does not alter the situation." *Knotts*, slip op. 6. By exposing his activities to public view, an individual assumes the risk that those activities will be observed by, or reported to, the police. Whether the Fourth Amendment applies when a beeper is used to monitor those activities does not turn on the fortuity of someone actually seeing the individual's movements. The point is that the individual could not reasonably have expected that his movements would not be detected. See *Smith* v. *Maryland*, 442 U.S. at 744-745.

Moreover, the information revealed by a beeper—that the container to which it is attached has arrived at a particular location—is the same regardless of whether the beeper is broadcasting its signals from a position inside the premises (as here) or outside the premises (as in *Knotts*).[8] In this regard, we note

---

[8] Although the Court in *Knotts* intimated (slip op. 6, 9) that the beeper-laden container was situated outside Knotts' cabin at the time its signals were monitored, the record in that case did not actually reflect the precise location of the container at the time of the monitoring (see *id.* at 1) (Stevens, J., concurring). The container was discovered under a barrel outside the cabin during a search of the premises three days after the monitoring (*id.* at 3), but the monitoring itself

that a beeper is merely a radio transmitter that emits signals that can be picked up by a receiver. See *Knotts*, slip op. 1. When monitored from a distance, a beeper is not capable of disclosing its exact location. By monitoring the direction from which a beeper's signals are coming, agents can ascertain that the beeper is located somewhere in or around a particular structure or vehicle, but in the usual case they cannot determine its precise resting place without exposing themselves to detection. Thus, as a practical matter, a beeper ordinarily does not even disclose whether it has been taken inside a residence.[9] And, even if the agents are able, through monitoring, to discover that a beeper is located inside certain premises, the beeper itself tells nothing about the interior of the premises into which it has been taken other than the fact that it is there.[10] Because, under *Knotts*, respondents had

---

disclosed only that the beeper was broadcasting from somewhere on Knotts' property. See 81-1802 Gov't Br. 26-27 & n.14.

[9] This point is illustrated by Agent Rottinger's affidavit supporting the search warrant for the Taos residence. In the affidavit, Agent Rottinger stated that by monitoring the beeper, the agents were able to determine only that the can of ether was "at or in the immediate vicinity of" certain residences (J.A. 54; see also J.A. 56-57). Similarly, at each of the two storage locker facilities, the beeper did not by itself enable the agents to determine which locker contained the ether (J.A. 55-56). The only occasion on which the use of the beeper disclosed that the ether was inside private premises was during the surveillance of the Taos residence (J.A. 57-58).

[10] In some cases, law enforcement officials have employed a beeper that transmits not only its location but also the fact that the package in which it has been installed has been opened, an event signaled by a change in the beeper's tone. See *United States* v. *Sheikh*, 654 F.2d 1057, 1071 (5th Cir.

no legitimate privacy expectations with respect to the arrival of the container at any particular location, it is immaterial that the beeper may actually have been situated inside private residences or storage lockers at the times its signals were monitored. The information gained by use of the beeper in this case—where the ether had been taken—was precisely the same as that gained in *Knotts*, and the two cases are therefore analytically indistinguishable.[11]

The court of appeals' contrary ruling serves no interest protected by the Fourth Amendment. The court appears to have acknowledged, albeit reluctantly, that under *Knotts* monitoring of the beeper to track the movements of the can of ether as it was being transported from place to place by respondents did not implicate the Fourth Amendment (Pet. App. 11a). Nevertheless, because the can happened to be located inside rather than outside private premises when its signals were monitored, the court held that the monitoring was transformed into a search. But given the

---

1981), cert. denied, 455 U.S. 991 (1982); *United States* v. *Dubrofsky*, 581 F.2d 208 (9th Cir. 1978). Because the beeper involved in this case did not convey this information (and, so far as we know, did not have the capacity to do so), it is not necessary for the Court to consider any distinct Fourth Amendment implications that may relate to monitoring such a beeper. We note, however, our view that even if the use of such a device may be considered a search or seizure for Fourth Amendment purposes, the warrant requirement should not be applicable because the "search" is so limited in scope. See pages 31-46, *infra*.

[11] Like *Knotts*, this case does not involve the use of a beeper to monitor the movement of the container from place to place *within* private premises. Use of a beeper for that purpose would provide at least an arguable basis, absent here, for distinguishing *Knotts*.

limited information conveyed by a beeper and the limited uses to which such information may be put, it is wholly arbitrary to differentiate for constitutional purposes between beeper signals that emanate from inside rather than from outside private premises. Not only is it true, as noted above, that the beeper does not disclose anything about the interior of the premises (except that it is there), but it is of no additional value to the agents to discover that the beeper is inside, as opposed to outside, those premises. For example, here, as was the case in *Knotts*, the agents were concerned with tracing the movements of the chemicals to ascertain their ultimate destination. In accomplishing that task, the value of the information conveyed by the beeper—*viz.*, its presence at a particular location—is precisely the same, regardless whether the beeper is broadcasting from a position directly inside or outside the front door of a house. Thus, here as in *Knotts*, the mere fact that the beeper may have been physically "trespassing" on respondents' property at the time its signals were monitored does not convert the agents' actions in monitoring those signals into a search or seizure. See pages 20-21, *supra*. Accordingly, the court of appeals' attempt (Pet. App. 9a-10a) to distinguish *Knotts* on the ground that here the beeper was monitored while it was inside certain private premises falls of its own weight.[12]

---

[12] The court of appeals expressed the view (Pet. App. 9a) that, because the beeper was monitored while the container was within private residences and storage lockers, it provided the agents with information that could not have been discovered even by constant visual surveillance. But the only information that the monitoring provided was the location to which the container had been taken, and that information could

The court of appeals also sought to distinguish *Knotts* by pointing to the length of the beeper sur-

---

very well have been ascertained by constant visual surveillance. To be sure, it is theoretically possible that a five-gallon can in which a beeper has been installed could be taken inside private premises, where it could be replaced by, or concealed within, another container or transferred to a vehicle before being taken to another location. However, such "shell-game" maneuvers would not necessarily defeat visual surveillance. The authorities could undertake surveillance of any suspicious container that is removed from the premises and follow it to its next location, and they could follow any vehicle leaving the premises.

Particularly in a case such as this, where the container in question is one of a substantial number of large drums of chemicals that are in all likelihood destined for a single clandestine drug laboratory, constant visual surveillance would probably prove fruitful. We note that there is no indication in this case that anything was done with the ether that would have prevented the agents from monitoring its movements from one location to another by visual surveillance (except for the risk that close visual surveillance could more easily be detected by the suspects). In fact, the record suggests just the opposite. For instance, the agents monitoring the closed circuit video camera at the second storage locker had no difficulty observing Rhodes and an unidentified woman remove the ten five-gallon cans of ether and load them into a pickup truck, which the agents then followed to Rhodes's residence. From there, the agents followed the truck to the Taos residence. These circumstances suggest that respondents' actions in transporting the ether to various locations were open to public view and could have been ascertained by constant visual surveillance.

This type of surveillance would certainly have been far less efficient (and perhaps more dangerous) than using a beeper in tracking the movements of the ether, but, as the Court in *Knotts* pointedly observed, respondents have no constitutional basis for complaint that "scientific devices such as the beeper enabled the police to be more effective in detecting crime * * *. We have never equated police efficiency with unconstitutionality" (slip op. 8).

veillance in this case (five months) and the facts that the agents lost track of the ether "for significant periods of time" and for the most part were able to track the ether to new locations only by use of the beeper (Pet. App. 10a). But these differences in circumstances do not suggest that the beeper surveillance in this case invaded any legitimate expectations of privacy. The length of time a beeper is monitored should have no bearing on the applicability of the Fourth Amendment because the limited nature of the information revealed by the monitoring is not affected by its duration. Thus, whether the monitoring takes place over one day or several months, the only information revealed by a beeper is its present location.[13]

Similarly, the fact that the agents often had to rely on the beeper during the period of surveillance to ascertain the location of the ether is of no moment. In *Knotts* the Court observed (slip op. 9) that, "because of the failure of the visual surveillance, the beeper enabled the law enforcement officials * * * to ascertain the ultimate resting place of the chloroform when they would not have been able to do so had they relied on their naked eyes. But scientific enhancement of this sort raises no constitutional issues which visual surveillance would not also raise." The Court went on to observe that, by using visual surveillance techniques, the officers "could have" followed the chemicals to their destination on private property. Likewise, the agents in this case could have used

---

[13] As counter-surveillance techniques employed by drug rings become more sophisticated, the period of beeper surveillance is likely to increase. See pages 43-44, *infra*. But the nature of the information revealed by the beeper on the 50th day of surveillance (its present location) is the same as that revealed on the first day.

visual surveillance methods to track the chemicals to their ultimate destination in Taos. See note 12, *supra*. As *Knotts* teaches, the fact that the use of the beeper provided a much safer and more efficient means of surveillance and substantially diminished the law enforcement resources that otherwise would have had to have been expended to trace the chemicals has no constitutional implications.

Even if there were circumstances in which the monitoring of a beeper after it has been taken inside a private residence somehow provided information that could not have been obtained through visual surveillance, that would not convert the beeper surveillance into a "search" within the meaning of the Fourth Amendment. The monitoring of a beeper in these circumstances is no more intrusive than a "canine sniff" of personal luggage by a narcotics detection dog, which this Court has held does not raise Fourth Amendment concerns. *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 10-11. The Court in *Place* noted that, although "the sniff tells the authorities something about the contents of the luggage"—that is, whether or not it contains contraband drugs—"the information obtained is limited" (slip op. 11). By comparison, the monitoring of a beeper located inside a residence reveals the presence of the beeper, but "[i]t reveals nothing more about the contents of, or activities in, the residence." *United States* v. *Brock*, 667 F.2d 1311, 1321 (9th Cir. 1982), cert. denied, No. 81-6922 (Mar. 7, 1983).

Similarly, in *Illinois* v. *Andreas*, *supra*, this Court held that where the police have lawfully opened a container and identified its contents as illegal, a subsequent reopening of that container following a con-

trolled delivery does not intrude on legitimate privacy interests, and thus is not a search under the Fourth Amendment, unless there is a "substantial likelihood" that the contents of the container have been changed during any gap in the surveillance. In reaching this result, the Court recognized that it is not unusual for police to lose sight of the container while seeking to avoid detection, and that "[d]uring such a gap in surveillance, it is possible that the container will be put to other uses—for example, the contraband may be removed or other items may be placed inside" (slip op. 6-7). The Court nevertheless concluded that "it would be absurd to recognize as legitimate an expectation of privacy where there is only a minimal probability that the contents of a particular container had been changed" (slip op. 7). Here, too, we submit, there is no reasonable basis for recognizing as legitimate an expectation of privacy in the mere location of a container—information that would often, if not always, be discoverable through visual surveillance of public areas.

**B. Even If The Monitoring Of The Beeper Was A Search Or Seizure, The Fourth Amendment Standard of Reasonableness Was Satisfied**

***1. The use of a beeper is "reasonable" for Fourth Amendment purposes if it is based on a reasonable suspicion of criminal activity***

We have argued in the preceding point that as a matter of logic and precedent, the use of a beeper that occurred in this case is analytically indistinguishable from the use in *Knotts*, with the result that there was here no search or seizure regulated by the Fourth Amendment. If this is correct, it would mean that the Fourth Amendment does not proscribe even

random or suspicionless use of beepers to track containers of chemicals as they are moved about from one location to another. As a practical matter, however, law enforcement agencies do not use beepers in such circumstances, but only when they have some reason to believe that unlawful activity is afoot and that a beeper will help in the effective investigation of their suspicions. What is of practical importance, therefore, is the quantum of suspicion that will be required before beeper surveillance techniques may be utilized. If the court of appeals is correct in requiring a warrant, a necessary correlative of that conclusion is that probable cause is a prerequisite to beeper use; but just as visual surveillance is an important aid to the early stages of an investigation, at a time when officers may possess suspicion falling short of probable cause, so too beepers can be of inestimable value in developing probable cause. Accordingly, as we now show, it is not reasonable to require probable cause as a prerequisite to the use of beepers.

Since *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court has recognized, in a variety of situations, that certain law enforcement actions that qualify as Fourth Amendment searches or seizures are nevertheless not so intrusive as to require probable cause. In *Terry* itself, the Court noted that a policeman who stops a person on the street and frisks him for weapons has undoubtedly effected a "seizure" and "search" of that person within the purview of the Fourth Amendment.[14] However, because "the central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security" (392 U.S. at 19), the Court concluded that a stop and frisk, which is considerably less intrusive than a full-blown arrest and search of a person, may be undertaken on less than probable cause, although the facts known to the officer must at least support a reasonable inference of unlawful activity and, for the frisk, that the person may be armed.

In subsequent cases, the Court has continued to recognize that there are various types of police activities of limited intrusiveness that need not be justified by probable cause. For example, in *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554-555 (1976) (citations omitted), the Court stated:

---

[14] As the Court in *Terry* explained (392 U.S. at 16):

> It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search."

> The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals. * * * In delineating the constitutional safeguards applicable in particular contexts, the Court has weighed the public interest against the Fourth Amendment interest of the individual * * *.

In upholding the routine stopping of vehicles at fixed checkpoints and the detention of some of them for several minutes in the absence even of individualized suspicion, the Court in *Martinez-Fuerte* concluded that the government's substantial interest in operating such checkpoints in order to control the flow of illegal aliens outweighed the limited intrusion on the Fourth Amendment interests of the motoring public occasioned by stopping a vehicle, briefly questioning its occupants, and inspecting the parts of the vehicle that can be seen without a search. See also *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983).

The Court followed a similar approach in three cases decided last Term. In *United States* v. *Place*, *supra*, the Court held that an officer may detain a traveller's luggage on reasonable suspicion that it contains narcotics, provided that the detention is brief and limited in scope. In upholding the permissibility of this practice, the Court noted that some luggage detentions "may be so minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a seizure based only on specific articulable facts that the property contains contraband or evidence of a crime" (slip op. 10). In addition, the Court in *Michigan* v. *Long*, No. 82-256 (July 6, 1983), upheld a limited protective search of an automobile for weapons dur-

ing a lawful stop of the automobile, concluding that such a search, if based on a reasonable suspicion that the suspect is dangerous and may gain immediate control of weapons, is justified by the strong interest in protecting the police and others from violence in the course of automobile stops. Finally, in *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), the Court upheld suspicionless boardings of vessels by Customs officers for the purpose of inspecting the vessels' documentation. In so doing, the Court emphasized (slip op. 13 (footnote and citations omitted)):

> While the need to make document checks is great, the resultant intrusion on Fourth Amendment interest is quite limited. While it does intrude on one's ability to make "free passage without interruption," * * * it involves only a brief detention where officials come on board, visit public areas of the vessel, and inspect documents. * * * "Neither the [vessel] nor its occupants are searched, and visual inspection of the [vessel] is limited to what can be seen without a search." * * * Any interference with interests protected by the Fourth Amendment is, of course, intrusive to some degree. But in this case, the interference created only a modest intrusion.

Likewise, in a case where the monitoring of a beeper is undertaken, as it was here, to uncover a clandestine drug laboratory, the government interest outweighs the minimal intrusion, if any, into an individual's legitimate privacy interests. There can be little doubt that the government interest served by the beeper surveillance in this case was, at the very least, substantial. As Justice Powell observed in his concurring opinion in *United States* v. *Mendenhall*, 446 U.S. 544, 561-562 (1980):

> The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs, including heroin, may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of enforcement.

See also *Place*, slip op. 7.

As a practical matter, the difficulties of law enforcement are particularly acute in the context of unlawful drug manufacturing ventures. Because ingredients and equipment may be purchased legally, the only effective means of apprehension before the unlawful drug is distributed is to locate the drug laboratory. As the facts of this case nicely illustrate, discovery of a clandestine drug laboratory is a task requiring considerable police organization and ingenuity. Even with the indispensable help of the beeper, the surveillance in this case involved a substantial expenditure of law enforcement resources, including the use of a number of agents, an entry tone alarm, a closed circuit video camera and monitor, an aircraft and several land vehicles (J.A. 78-84, 86-88, 92-93).

At the same time, as already noted, the use of a beeper constitutes a limited intrusion, if any, on legitimate privacy interests. A beeper does not conduct either a visual or aural search of the place into which it is taken. Even when taken inside a house, a beeper gives out one piece of information and one piece of information only: "Here I am."

The facts of this case underscore the limited information that a beeper conveys. Here, the agents used the beeper to trace the ether to residences and storage lockers and finally to the clandestine drug laboratory in Taos. The beeper disclosed no information about respondents' activities inside their residences, and the information it did disclose—about respondents' actions in transporting the ether from place to place—could also have been obtained (albeit less efficiently) by means of continuous visual surveillance. Thus, the monitoring of the beeper interfered minimally, if at all, with respondents' legitimate expectations of privacy.

Because the substantial societal concern with drug enforcement outweighs the limited Fourth Amendment privacy interests that arguably are implicated by beeper surveillance, use of a beeper as an investigative tool to locate a source of illegal drugs is fully justified on the basis of reasonable suspicion that criminal activity is afoot. In a similar situation, a plurality of the en banc Fifth Circuit concluded, in *United States* v. *Michael*, 645 F.2d 252, cert. denied, 454 U.S. 950 (1981), that reasonable suspicion was sufficient to justify the monitoring of a beeper to locate a clandestine drug laboratory by tracking the movements of an automobile driven by the defendant. In reaching this result, the plurality

> consider[ed] the governmental interest in eliminating illegal drug manufacture to be a persuasive reason to permit this minimally intrusive practice. An "intermediate response" based on something less than probable cause, is a proper investigatory tool to aid DEA agents in discovering and eliminating clandestine laboratory operations. In balancing the public concerns served by the use of the beeper to discover Michael's drug manufacturing apparatus against

> the slight infringement of Michael's expectation of privacy, we find the beeper's use to be eminently reasonable.

645 F.2d at 259 (footnotes omitted).

In short, because beepers convey sharply limited information about matters that can be deemed private only in the most theoretical sense, their use poses little, if any, threat to legitimate Fourth Amendment interests. Accordingly, the reasonableness requirement of the Fourth Amendment is not served by imposing upon beeper surveillance the same requirement of probable cause as is imposed on conventional searches that by their nature reveal private matter to official eyes.

***2. The use of a beeper should in any event not require a warrant***

As we have shown, a balancing of the pertinent government and individual interests supports the conclusion that beeper surveillance may be undertaken if the authorities reasonably suspect that criminal activity is afoot. If reasonable suspicion is sufficient to justify use of a beeper, it follows that a warrant, which may be issued only on probable cause, is not required under the Fourth Amendment. But even if probable cause is required, the monitoring of a beeper should not require a warrant.

Here, the agents had probable cause to believe that a crime was being committed and that evidence concerning that offense would be obtained through use of the beeper. The agents knew that Muehlenweg had previously procured laboratory equipment and chemicals used to manufacture amphetamine for Richard Logan, a suspected drug offender. In addition, Muehlenweg told the agents that he had pre-

viously ordered ether for respondents Karo, Horton, and Harley for use in the production of cocaine. When Muehlenweg informed the agents that he had ordered another shipment of ether for use by those individuals in their illicit drug venture, the agents confirmed that that order had been placed. These facts clearly provided the agents with probable cause to believe that Karo, Horton, and Harley were engaged in an unlawful narcotics scheme. The facts also justified the belief that the use of the beeper would uncover evidence of the scheme, because it was highly likely that the ether would ultimately be transported to a clandestine laboratory where other possible participants in the conspiracy might be present. In these circumstances, use of the beeper to help uncover the location of the laboratory and identify other participants was a perfectly reasonable investigative technique.

The court of appeals did not question the existence of probable cause in this case. Instead, the court held that respondents' Fourth Amendment rights had been violated because the agents failed to obtain a valid warrant authorizing the use of the beeper. Although the court held (as regards the monitoring issue) that law enforcement agents are required to obtain a warrant before they monitor a beeper only if it has been taken inside private premises, for all practical purposes the court's holding will force agents to obtain warrants in every beeper case, because they have no way of knowing in advance whether or not the beeper will be broadcasting its signals from inside private premises at any point during the surveillance.

The court of appeals erred in its imposition of a warrant requirement. Although this Court has stated

in a variety of contexts that a warrant is presumptively required before a search of private property may be deemed reasonable under the Fourth Amendment, the warrant requirement is not absolute. Exceptions have been recognized "where it was concluded that the public interest required some flexibility in the application of the general rule," particularly where "the societal costs of obtaining a warrant * * * outweigh the reasons for prior recourse to a neutral magistrate." *Arkansas* v. *Sanders*, 442 U.S. 753, 759 (1979).

In our view, the issue whether a particular search must be supported by a warrant in order to meet the Fourth Amendment's standard of reasonableness cannot be decided without taking into account the magnitude of the individual privacy interest invaded by the search. This point may be illustrated by examining this Court's decisions recognizing the so-called "automobile search" exception to the warrant requirement. Although the Court has relied on exigent circumstances to justify warrantless probable cause searches of automobiles stopped along the highway, the Court has also upheld car searches in the absence of any exigencies, based on the owner's diminished expectation of privacy in his automobile. See *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977); *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion); *Chambers* v. *Maroney*, 399 U.S. 42 (1970). Given the extremely limited intrusion into legitimate privacy interests entailed by the monitoring of a beeper, an intrusion that is much narrower than that involved in a search of the private areas of an automobile, we submit that the reasonableness of such monitoring should not turn on whether it was authorized by a warrant.

Traditionally, a warrant has been described as serving three basic functions. First, "[i]ts protection consists in requiring that * * * inferences [from evidence relied upon to establish probable cause for a search] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U.S. 10, 14 (1948) (footnote omitted). Second, a warrant serves to define the scope of the search, limiting it to bounds commensurate with the probable cause underlying its issuance. *United States* v. *Chadwick*, 433 U.S. at 9. Third, the presence of a warrant serves to assure persons subjected to a search "of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Ibid.* See *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 323 (1978); *Camara* v. *Municipal Court*, 387 U.S. 523, 532 (1967).

These policies have little, if any, application to the monitoring of signals from a beeper attached to a package of chemicals that are likely to be used to manufacture illegal drugs. To begin with, the notice function of the warrant is inapposite because beeper surveillance cannot be effective unless it is carried out surreptitiously, without the knowledge of the person or persons transporting the package.[15] In addition, a warrant cannot serve to define the scope of the search;

---

[15] In the case of electronic eavesdropping, which involves a far greater intrusion into privacy interests than the use of a beeper, this Court has recognized that even though a warrant is required, interception of conversations may be undertaken without advance notice because otherwise the whole purpose of the interception would be defeated. See *Katz* v. *United States*, 389 U.S. at 355 n.16; *Dalia* v. *United States*, 441 U.S. at 247-248.

any search or seizure effected by the use of a beeper is inherently limited in scope to a single piece of information. Moreover, it is impossible to restrict the agents in advance to monitoring the beeper's signals from only certain specified locations, because when beeper surveillance is instituted it is not known where the container will be taken.[16] It is thus ordinarily impossible to obtain a warrant that satisfies the requirement of the Fourth Amendment that the "place" to be "searched" be particularized. The agents will almost never have probable cause to believe that the beeper will broadcast from any given location; the whole purpose for undertaking this type of surveillance is to locate the beeper's unknown destination.[17]

It is true that a beeper warrant could serve to limit the period of authorized surveillance, and, in fact, the Sixth Circuit has held not only that beeper sur-surveillance must be authorized by a warrant, but that a beeper warrant that "places no time limit on the search or seizure it purports to authorize is invalid." *United States* v. *Bailey*, 628 F.2d 938, 945 (1980). See also *United States* v. *Cassity*, 720 F.2d 451 (6th Cir. 1983), petition for cert. pending, No. 83-1393 (filed Feb. 21, 1984). The court in *Bailey* reasoned that the Fourth Amendment requires a showing "of *present* probable cause" (628 F.2d at

---

[16] Indeed, each time the beeper's signals are monitored, the agents do not know ahead of time whether those signals will be emanating from inside or outside private premises.

[17] Of course, if, as a result of the beeper surveillance, the agents decide to conduct a traditional search of any private premises, they must obtain a valid warrant authorizing such a search. Here, the agents obtained a warrant authorizing a search of the Taos residence.

945 (emphasis in original)), and suggested that information justifying the institution of beeper surveillance might become stale over time. In addition, the court expressed the view that "[u]nless the warrant contains a time limit, it cannot assure the reasonableness of the search it purports to authorize" and is therefore invalid under the Fourth Amendment (628 F.2d at 945).

The reasoning of the Sixth Circuit in *Bailey* completely overlooks the significant differences between beeper surveillance and traditional searches and seizures. As we have already pointed out, the information disclosed by a beeper—its own location—is extremely limited in scope and does not change over time. Of course the location in which the chemicals are stored may, and typically does, change over time as the conspirators employ counter-surveillance methods, but the beeper still discloses only the single piece of information as to its location. In contrast to a conventional search for contraband or other evidence at a location that can be identified to the magistrate in advance, as to which the concept of staleness has obvious relevance, the sole purpose of beeper monitoring is to keep track of the location of the container, a matter as to which staleness concepts have little utility.

Furthermore, as the facts of this case illustrate, in addition to moving chemicals and equipment to different locations to avoid detection, drug manufacturers characteristically hold on to the chemicals and equipment for a considerable but unpredictable length of time before commencing their illicit manufacturing operations.[18] (These tactics are designed to reduce the

---

[18] See, *e.g.*, *United States* v. *Cassity*, 720 F.2d at 454; *United States* v. *Taylor*, 716 F.2d 701, 704 (9th Cir. 1983); *United*

risk of effective visual surveillance and also tend to impair beeper surveillance, because a beeper's batteries wear out over time.[19]) Given these facts, and the additional fact that a traditional search warrant —based on a showing of current probable cause—must ordinarily be procured before the agents may conduct an actual search of the premises to which the beeper has been traced, a time limitation for beeper surveillance (imposed by way of a beeper warrant requirement) would serve no meaningful function.

Beyond this, the benefits of interposing a neutral magistrate to determine whether justification for a search or seizure exists in a given case cannot be isolated from consideration of the degree of intrusion into protected privacy interests occasioned by the proposed law enforcement action. An officer who searches a house or taps a telephone without probable cause has intruded unjustifiably into an area to which our society attaches strong privacy interests, causing a grave and largely irreparable injury. If the pro-

---

*States* v. *Braithwaite*, 709 F.2d 1450, 1452 (11th Cir. 1983); *United States* v. *Bentley*, 706 F.2d 1498, 1502 (8th Cir. 1983); *United States* v. *Ellery*, 678 F.2d 674, 676 (7th Cir. 1982), cert. denied, 459 U.S. 868 (1982); *United States* v. *Dunn*, 674 F.2d 1093, 1096 (5th Cir. 1982); *United States* v. *Brock*, 667 F.2d at 1314; *United States* v. *Bailey*, 628 F.2d at 939; *United States* v. *Noll*, 600 F.2d 1123, 1125 (5th Cir. 1979); *United States* v. *Clayborne*, 584 F.2d 346, 348 (10th Cir. 1978); *United States* v. *Bernard*, 623 F.2d at 553-554 & n.5; *United States* v. *Hufford*, 539 F.2d at 33; *United States* v. *Stephenson*, 490 F. Supp. 619, 620-621 (E.D. Mich. 1979).

[19] On occasion, DEA agents have obtained judicial authorization to enter private premises for the purpose of replacing a beeper's worn out batteries. See, *e.g.*, *United States* v. *Bailey*, 628 F.2d at 939. We agree that the Fourth Amendment imposes a warrant requirement for such entries. See page 19, note 6, *supra*.

phylaxis of a warrant requirement avoids even a relatively small number of unreasonable searches of this nature, the personal security of the citizenry will have been meaningfully advanced. The same cannot be said in the context of beeper surveillance, because in the typical beeper case the information conveyed by the beeper—that a vehicle or a package whose contents are known to the authorities has arrived or is situated at a particular location—could have been obtained through direct visual surveillance without any intrusion into legitimate privacy interests. Even if the use of a beeper might be said in some instances to intrude to some extent upon cognizable Fourth Amendment privacy interests, that slight intrusion " 'is abstract and theoretical' " (*Cardwell* v. *Lewis*, 417 U.S. at 592 (plurality opinion), quoting *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861, 865 (1974)) and is simply not comparable to the intrusions occasioned by searches and seizures that have been required to be authorized by warrant. It can be adequately controlled, and abuses deterred, by the availability of post-search judicial review.

On the other hand, requiring procurement of a warrant to achieve the marginal benefits of antecedent judicial control of these limited intrusions in the case of a beeper or a similar enhancement device would entail significant costs. A warrant requirement would necessitate compliance with various procedural technicalities unrelated to the question of probable cause. Accordingly, there exists the danger—one that was actually realized in *Bailey* and other cases—that the agents' expenditure of considerable investigative resources to develop probable cause might go for naught because of an inadvertent failure to observe some procedural technicality associated with the warrant requirement. Moreover, requiring a warrant in this

setting would trivialize the Warrant Clause of the Fourth Amendment and dilute the effectiveness of the warrant procedure itself. As Professor LaFave has stated:

> Use of the warrant process to deal with police practices which present only a "minor peril to Fourth Amendment protections," it could well be argued, would tend to downgrade that process and thus might tempt magistrates to be less cautious in exercising their warrant-issuing authority. That is, it may well be that, as a practical matter, the warrant process can best serve as a meaningful device for the protection of Fourth Amendment rights if it is used somewhat selectively to prevent those police practices which would be most destructive of Fourth Amendment values.

1 W. LaFave, *Search and Seizure* § 2.2, at 290 (1978) (footnotes omitted).

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
*Solicitor General*

STEPHEN S. TROTT
*Assistant Attorney General*

ANDREW L. FREY
*Deputy Solicitor General*

ELLIOTT SCHULDER
*Assistant to the Solicitor General*

VINCENT L. GAMBALE
*Attorney*

MARCH 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 435151 287

Office - Supreme Court, U.S.
FILED
APR 2 1984
ALEXANDER L. STEVAS

No. 83-850

In The
# Supreme Court of the United States
October Term, 1983

—o—

UNITED STATES OF AMERICA,
*Petitioner,*
vs.
JAMES CONNORS KARO, *et al.*,
*Respondents.*

—o—

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

—o—

## BRIEF FOR RESPONDENTS KARO, ROTH AND STEELE

—o—

NANCY HOLLANDER
Freedman, Boyd & Daniels, P.A.
20 First Plaza, Suite 212
Albuquerque, NM 87102
(505) 842-9960

Counsel for Respondent Karo

REBER BOULT
1412 Lomas Blvd., NW
Albuquerque, NM 87104
(505) 842-0392

Counsel for Respondent Roth

JAMES BEAM
715 Tijeras, NW
Albuquerque, NM 87102
(505) 842-5924

Counsel for Respondent Steele

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102
(800) 835-7427 Ext. 333

## TABLE OF CONTENTS

Pages

Statement of Facts ..... 1

Summary of Argument ..... 2

Argument:

I. Monitoring A Beeper Within A Place In Which One Has A Reasonable Expectation of Privacy Is A Search Within The Meaning Of The Fourth Amendment. ..... 5

II. Any Search Within A House Or Private Storage Locker Invades Legitimate Expectations of Privacy. ..... 9

III. Both Probable Cause And A Warrant Are Required To Monitor A Beeper Inside A House. ..... 11

IV. Adopting A Standard Of Reasonable Suspicion Of Criminal Activity In This Situation Would Be A Violation Of The Fourth Amendment. ..... 18

V. It Is Feasible To Secure A Warrant Prior To Installing And Monitoring A Beeper. ..... 23

VI. The Fourth Amendment Must Flex To Meet The Challenge Of New Technology. ..... 28

VII. Installation Of A Beeper Requires A Warrant. ..... 30

VIII. The Decision Should Be Affirmed Because Of The Government's Outrageous Conduct. ..... 34

Conclusion ..... 40

## TABLE OF AUTHORITIES

CASES:

Arkansas v. Sanders, 442 U.S. 753 (1979) ..... 17

Berger v. New York, 388 U.S. 41 (1967) ..... 25, 27, 30

Carroll v. United States, 267 U.S. 132 (1925) ..... 14

G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) ..... 16

TABLE OF AUTHORITIES—Continued


| | Pages |
|---|---|
| Illinois v. Andreas, 103 S. Ct. 3319 (1983) | 8 |
| Johnson v. United States, 333 U.S. 10 (1948) | 11, 12 |
| Katz v. United States, 389 U.S. 347 (1967) | 3, 4, 15, 16, 25, 28, 32 |
| Lopez v. United States, 373 U.S. 427 (1963) | 27 |
| Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) | 29 |
| Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) | 16 |
| McNabb v. United States, 318 U.S. 332 (1943) | 35 |
| Michigan v. Clifford, 104 S. Ct. 641 (1984) | 12 |
| Michigan v. Long, 103 S. Ct. 3469 (1983) | 19, 20 |
| Miller v. United States, 357 U.S. 301 (1958) | 9 |
| Mincey v. Arizona, 437 U.S. 385 (1978) | 16, 30 |
| Mooney v. Holohan, 294 U.S. 103 (1935) | 38 |
| Napue v. Illinois, 360 U.S. 264 (1959) | 38 |
| New York v. Belton, 453 U.S. 454 (1981) | 16 |
| Payton v. New York, 445 U.S. 573 (1980) | 9 |
| Rawlings v. Kentucky, 448 U.S. 98 (1980) | 33 |
| Sony Corp. v. Universal City Studios, 104 S. Ct. 774 (1984) | 28 |
| Sorrells v. United States, 287 U.S. 435 (1932) | 38 |
| Terry v. Ohio, 392 U.S. 1 (1968) | 18, 19, 20 |
| Texas v. Brown, 103 S. Ct. 1535 (1983) | 26 |
| United States v. Bailey, 628 F.2d 938 (6th Cir. 1980) | 9 |
| United States v. Beale, 52 U.S.L.W. 2280 (9th Cir. Oct. 24, 1983) | 9 |

TABLE OF AUTHORITIES—Continued

Pages

United States v. Butts, 710 F.2d 1139 (5th Cir.), *rehearing en banc granted*, No. 82-1260 (Oct. 25, 1983) ..... 24

United States v. Cassity, 720 F.2d 451 (6th Cir. 1983), *petition for cert. pending*, No. 83-1393 ..... 24

United States v. Chadwick, 433 U.S. 1 (1977) ..... 16, 17, 27, 31

United States v. Chavez, 603 F.2d 143 (10th Cir. 1979) ..... 24

United States v. Cortina, 630 F.2d 1207 (7th Cir. 1980) ..... 5, 35

United States v. Cox, 449 F.2d 679 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972) ..... 26

United States v. Donovan, 429 U.S. 413 (1977) ..... 25

United States v. Hasting, 103 S. Ct. 1974 (1983) ..... 39

United States v. Hogan, 712 F.2d 757 (2d Cir. 1983) ..... 39

United States v. Janis, 428 U.S. 433 (1976) ..... 37

United States v. Kahn, 415 U.S. 143 (1974) ..... 25

United States v. Karo, 710 F.2d 1433 (10th Cir. 1983) ..... *passim*

United States v. Knotts, 103 S. Ct. 1081 (1983) ..... 10, 29, 32, 33, 34

United States v. Leon, *cert. granted*, No. 82-1771 (June 27, 1983) ..... 16

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) ..... 19

United States v. Michael, 645 F.2d 252 (5th Cir.) (en banc), *cert. denied*, 454 U.S. 950 (1981) ..... 22

United States v. New York Telephone Co., 434 U.S. 159 (1977) ..... 35

TABLE OF AUTHORITIES—Continued

Page

United States v. Payner, 447 U.S. 727 (1980) ..... 35, 36

United States v. Place, 103 S. Ct. 2637 (1983) ..... 13, 20, 21

United States v. Rettig, 589 F.2d 418 (9th Cir. 1978) ..... 39

United States v. Ross, 456 U.S. 798 (1982) ..... 3, 7, 8, 9, 16, 30

United States v. Salvucci, 448 U.S. 83 (1980) ..... 11

United States v. Villamonte-Marquez, 103 S. Ct. 2573 (1983) ..... 19

United States v. White, 401 U.S. 745 (1971) ..... 32

Vale v. Louisiana, 399 U.S. 30 (1970) ..... 11, 12, 14

Wong Sun v. United States, 371 U.S. 471 (1963) ..... 33

OTHER AUTHORITIES:

U.S. Const. Amend IV. ..... *passim*

18 U.S.C. §2517(5) (1976) ..... 26

18 U.S.C. §2518(1)(b) (1976) ..... 25

1 W. LaFave, Search & Seizure (1978) ..... 13

No. 83-850

In The

# Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,

*Petitioner,*

vs.

JAMES CONNORS KARO, *et al.*,

*Respondents.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

## BRIEF FOR RESPONDENTS KARO, ROTH AND STEELE

## STATEMENT OF FACTS

The government's statement of facts is adequate except for the following additions:

In a footnote to its Statement of Facts, the government errs in describing Karo's status (Brief 10 n.5[1]). Although it correctly notes that Karo had no connection

[1]The brief for the United States in this Court is cited herein as "Brief"; the appendix to the Petition for Certiorari is cited as "Pet. App."; and the Joint Appendix, "J. App."

with the Taos residence the government searched as the culmination of the beeper activity (except that the search of that residence was the fruit of the intrusion of the beeper into Karo's personal property and the monitoring of it in his home), the government incorrectly claims Karo's fourth amendment interest depends solely on the installation of the beeper in his ether. The government also invaded Karo's fourth amendment interests by monitoring the beeper in his home. The Court of Appeals noted this, *United States v. Karo,* 710 F.2d 1433, 1437, 1440 (10th Cir. 1983), and it is supported by the record (J. App. 54).

The government's statement of facts notes that while under visual surveillance Karo took the ether to his house and then returned to the informant, Muehlenweg's residence. The government fails to mention, however, that when Karo returned to Muehlenweg's house, it was without the ether, a fact the agents learned when, through the use of their beeper, they determined that the ether container remained in Karo's house (J. App. 54).

## SUMMARY OF ARGUMENT

The Court of Appeals correctly ruled that both the installation of a beeper in a private property and the monitoring of a beeper inside a home are searches within the meaning of the fourth amendment and require probable cause and search warrants. The government asserts the rather remarkable proposition that "neither the language nor the history of the Fourth Amendment reflects any intention to require warrants as a condition to a law-

ful search or seizure" (Brief 14). Although some searches do not require warrants,

> "[s]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."

*United States v. Ross*, 456 U.S. 798, 825 (1982) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

The point of departure in the government's argument is that the use of beepers does not constitute a search because the beeper only says "Here I am." (Brief 36). The premise to which the government continuously returns misconstrues the true role of the beeper as a surveillance tool. In our case the DEA agents secreted the beeper in a container of ether. Just as a police agent might enter a home to search for and possibly seize evidence, so these DEA agents turned on their receivers and searched until they found the beeper-laden container inside homes and storage lockers. Barring limited exigent circumstances, a police officer could never cross the threshold of a home without a warrant. The use of a beeper to search a home for a particular piece of evidence (here the ether container) is exactly the same kind of search.

Installation of the beeper inside the sealed ether container violated legitimate expectations of privacy of the three respondents who owned the container. The ether did not in any meaningful sense belong to the informant. Three of the respondents had the real interest in it. Any technical application of property law that would give the informant the ability to invade the respondents' expectations of privacy in their property would be inconsistent

with the fourth amendment's protection of "people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). It would be like giving the government, acting through its informant, the right to plant a listening device on the respondents, to remain in place after the informant had departed.

The government argues here that the installation and monitoring of beepers should, even inside private homes and inside private personal property, join the exceptions commonly known as exigent circumstances that do not require warrants. These proposed new "beeper" exceptions are nothing more than attempts to avoid the warrant requirement so clearly a part of the fourth amendment. The government would evade the warrant provision by:

1. Asserting that use of a beeper is never a search (Brief 17, 23);

2. Destroying the distinction between searches within a home and searches in other non-private locations (Brief 26-27);

3. Claiming that, if probable cause is required, a warrant is not (Brief 38);

4. Lowering the standard from probable cause to reasonable suspicion (Brief 31);

5. Asserting the absurd proposition that it is impossible or unfeasible to obtain a warrant for a beeper (Brief 42-46); and

6. Ignoring the import of changes in modern technology (Brief *passim*).

Finally, the fact that government agents lied to a judge to obtain the warrant in this case is an independent

ground for suppression based on due process and the courts' supervisory power. Federal courts "must draw the line at misconduct occurring within our own house[s]." *United States v. Cortina*, 630 F.2d 1207, 1217 (7th Cir. 1980).

## ARGUMENT

### I. Monitoring A Beeper Within A Place In Which One Has A Reasonable Expectation Of Privacy Is A Search Within The Meaning Of The Fourth Amendment.

The beeper is a surveillance tool used to search for the object into which it is placed. When this search occurs within a place where one has a reasonable expectation of privacy, it constitutes a fourth amendment search. The government describes the intrusion of a beeper as *de minimis* because the beeper only announces its presence (Brief 36) (and, more importantly, the presence of the container in which it is secreted), but does not give any information regarding the whereabouts of the defendants. The government's arguments concerning what a beeper is, what it does, and what it can do are disingenuous, inconsistent, and not supported by the record. It calls a beeper "merely a radio transmitter" (Brief 25). Unequivocally a beeper, like many electronic surveillance devices, is a radio transmitter; however, "merely" is hardly a correct adjective for a device that transmits information from within the privacy of homes and other areas protected by the fourth amendment.

According to the government, the beeper does not disclose its "exact location" (Brief 25) when "monitored

from a distance." (*Id.*). Neither the government's brief nor the record, however, tells us what "distance" is necessary to destroy the capability of exactly locating it. In this age of electronics it is a simple matter to get extremely accurate fixes using electronic devices. Many of these devices are "merely" radio transmitters and receivers.

Furthermore, neither the record nor the brief explains the "usual case" in which police agents "cannot determine its precise resting place without exposing themselves to detection." (*Id.*). We may assume that under cover of night or disguise the agents can usually get close enough to the resting place to precisely determine its location. The government does not contend that this case is not "usual"; it does state that here, at least, the beeper did disclose that "the ether was inside private premises" at the most crucial time. (*Id.* n.9).

This reference to the *ether* being inside private premises diverges from the government brief's consistent position that the beeper only discloses its own location. Obviously, the beeper does disclose the location of its container and of that container's contents. And it is normally the location of such items that police officers are trying to determine when they search private premises. Moreover, in the case of a physical search, it is usually much more important to determine that the item was within the premises than it is to ascertain exactly where it was located within the premises. For example, a police officer commonly seeks a search warrant so he can enter a home and search for a particular piece of evidence. Similarly, a policeman turns on his receiver and uses his beeper to "search" for a particular piece of evidence, perhaps finding it in a home, as happened here. The information

that the beeper discloses is, therefore, the same as the information disclosed by other searches subject to the warrant and probable cause requirements of the fourth amendment.

The government acknowledges, moreover, that some beepers even disclose what is happening to their containers while in these premises. (*Id.* n.10). The government stops short of asking this Court to bottom its decision on the kind of beeper employed, undoubtedly aware of the trend in recent fourth amendment cases to establish clear and unvarying rules that do not require policemen to indulge in complex analyses depending upon factual nuances. See, *e.g., United States v. Ross,* 456 U.S. 798, 821, 822 (1982). Such distinctions among these kinds of electronic transmitting devices would plunge the courts and law enforcement officers into a hopeless technological quagmire.

The government attempts to justify use of the beeper and at the same time deny that it is used to search on the grounds that it really does not help all that much. It claims everything the beeper discloses, the agents could discover by constant surveillance. (Brief 37). At the same time, the government maintains that it is a sorely needed law enforcement tool. (Brief 28 n.12). The government concedes, as it must given the facts in this case, that the beeper gives it capabilities it absolutely could not have even with a veritable army of visual surveillance agents.[2] In addition to the location and activity within the opaque walls of a house, the possibility is more actual than "theoretical" (Brief 28 n.12) that measures that

---

[2]The Court of Appeals found that, "[t]he beeper gave law enforcement officials information that could not be discovered by ordinary visual surveillance, even had that surveillance been constant." 710 F.2d at 1439.

would not be detected by lawful visual surveillance, would have no effect on electronic surveillance. In this case the agents followed Karo visually only to discover later that he had left the beeper and ether in his house. (J. App. 54).

*Illinois v. Andreas,* 103 S. Ct. 3319 (1983), does not support the government's argument. The Court decided that case on the rationale of the plain view doctrine:

> [O]nce a container has been found to a certainty to contain illicit drugs, the contraband becomes like objects physically within the plain view of the police, and the claim to privacy is lost.

*Id.* at 3324 (footnote omitted).

The Court reasoned that it was nearly impossible in the short period that the container was out of sight of the police for its contraband contents to have been changed; consequently its reopening was not a search. *Id.* Here, the container was behind closed doors for extended periods of time.

A search is not any less a search because the resources used cannot relay total information. A search that discloses facts about a piece of closed personal property is a search. "[T]he Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." *United States v. Ross,* 456 U.S. 798, 822-23 (1982). It is outreageous to describe a surveillance tool, used for five months, invading four residences and two storage lockers as a *de minimis* intrusion.

> An intrusion is not de minimis if it violates an individual's legitimate expectation of privacy. The Government's argument that the beeper surveillance is too minor an intrusion to constitute a search begs the question: the intrusion is minor only if it does not violate protected individual privacy.

*United States v. Bailey*, 628 F.2d 938, 940 (6th Cir. 1980) (footnote omitted). Another Court of Appeals has noted that the "unintrusiveness of a search does not reduce, or have any effect on, the basic expectation of privacy in the thing searched." *United States v. Beale*, 52 U.S.L.W. 2280 (9th Cir. Oct. 24, 1983).

## II. Any Search Within A House Or Private Storage Locker Invades Legitimate Expectations Of Privacy.

Nothing has been so firmly rooted in the constitutional history of this country and indeed of the English common law has the right to privacy inside one's home. William Pitt, (the Elder) Earl of Chatham, said it most eloquently when he addressed the House of Commons in March 1763:

> "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!"

Quoted in *United States v. Ross*, 456 U.S. 798, 822 n.31 (1982). See also *Miller v. United States*, 357 U.S. 301, 307 (1958). This Court has never failed to affirm this fundamental constitutional right. "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v. New York*, 445 U.S. 573, 590 (1980).

In defiance of this clear historical mandate, the government seeks to erase the major premise of the fourth amendment, leaving nothing but an empty shell.

> [G]iven the limited information conveyed by a beeper and the limited uses to which such information may

> be put, it is wholly arbitrary to differentiate for constitutional purposes between beeper signals that emanate from inside rather than from outside private premises.

(Brief 26-27).[3]

This crucial constitutional distinction remained firmly intact in the only beeper case this Court has decided, *United States v. Knotts*, 103 S. Ct. 1081 (1982).

> Respondent Knotts, as the owner of the cabin and surrounding premises to which Petschen drove, undoubtedly had the traditional expectation of privacy within a dwelling place insofar as the cabin was concerned.

*Id.* at 1085.

Each respondent in this case had the same "traditional expectation of privacy within a dwelling place" that *Knotts* affirmed. Without benefit of a warrant, DEA agents monitored their beeper inside houses and storage lockers owned by or occupied by each respondent in this case. No accepted exigent circumstance existed to avoid the warrant requirement.[4]

---

[3]In another section of its brief, the government refutes this argument that it is "wholly arbitrary" to differentiate between the inside of a house and the outside (Brief 27) by conceding that a warrant is required to go into a house to replace the batteries in a beeper (Brief 44, n.19). But this warrant requirement would be just as arbitrary if the agent truly confined himself to replacing the batteries. Indeed, it is more illogical because the hypothetical agent who confines himself to the batteries, searches for and seizes nothing while in the house, whereas the beeper tells the government that its container is in the house, *i.e.*, it searches the house for the container and finds it.

[4]The government has not argued below that any exigent circumstances existed to avoid the warrant requirement. Given the fact that the government did get a warrant here, albeit a defective one, the argument is specious.

The government argues that the information gained from monitoring the beeper is the same whether the beeper is inside or outside a home, making the resultant searches indistinguishable. (Brief 26). This is clearly not the case. For instance, the police may seize a marijuana plant sitting by the curb without a warrant but cannot seize that same plant located inside a house unless by proper warrant. Similarly, an officer can lift a fingerprint from an outside fencepost but must have a warrant to enter a suspect's home to search for or seize a fingerprint from an inside window. The flaw in the government's analysis is that the protection of the fourth amendment does not turn on the type of information gathered. The focus, rather, is on the subject's interest in the place searched or the property seized. *E.g., United States v. Salvucci,* 448 U.S. 83 (1980). The beeper is in reality a tiny, yet ubiquitous, government agent hiding inside the house, continuously searching to determine that its container remains in the home and broadcasting this information to agents on the outside.

### III. Both Probable Cause And A Warrant Are Required To Monitor A Beeper Inside A House.

Without explicitly saying it, the government advances here for the first time in this litigation the proposition that this Court should overrule the long-standing principles of cases such as *Johnson v. United States,* 333 U.S. 10 (1948)[5], and *Vale v. Louisiana,* 399 U.S. 30 (1970). The government contends that even if probable cause is re-

---

[5]The government cites *Johnson* in support of its argument against the need for a warrant (Brief 41). The defendants strongly agree with the implications of the government's quotation from that case, that the conclusion as to whether prob-

(Continued on next page)

quired, a warrant should not be. (See Brief 38-46). This contention flies directly in the face of well-established, fundamental requirements of the fourth amendment to require both a showing of probable cause and a warrant.

> Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.

*Johnson*, 333 U.S. at 14 (footnote omitted). And:

> our past decisions make clear that only in "a few specifically established and well-delineated" situations . . . may a warrantless search of a dwelling withstand constitutional scrutiny, even though the authorities have probable cause to conduct it.

*Vale*, 399 U.S. at 34.

In *Michigan v. Clifford*, 104 S. Ct. 641 (1984), this Court reaffirmed the viability of the warrant requirement where houses are involved. Although there was some disagreement over the exigency of the circumstances and over the standards for an administrative search, the Court was unanimous that absent consent or exigency a warrant is required when government agents enter a house to gather evidence of criminal activity. *Id.* at 646 (plurality opinion), 652 (Stevens, J., concurring), 653 (Rehnquist, J.,

---

(Continued from previous page)

able cause exists should " 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime' " (*id.*, quoting 333 U.S. at 14). This case is a perfect illustration of this need. Here, the law enforcement officials, including an Assistant United States Attorney, were so swept up in their "competitive enterprise" that they lied to the "neutral and detached magistrate." (J. App. 156).

dissenting, but agreeing with the majority that either a warrant issued upon probable cause or exigent circumstances is required). With some exceptions not relevant either there or here, "the nonconsensual entry and search of property is governed by the warrant requirement of the Fourth and Fourteenth Amendments." *Id.* at 646.

The government concludes its argument with a quotation from Professor LaFave's treatise which seemingly supports a contention that the warrant clause might not apply. (Brief 46). It omits, however, two pertinent facts about this quotation: (1) The sentence immediately before the quotation shows the professor is discussing "the use of trained dogs to sniff out drugs or explosives." 1 W. LaFave, *Search and Seizure,* § 2.2, at 289 (1978). (2) The sentence immediately following the government's quotation is: "However, this position has not as yet received attention from the courts." *Id.* at 290. In his supplement the author discusses this Court's approval of some uses of "canine sniffs" in *United States v. Place,* 103 S. Ct. 2637 (1983). *Id.* at 80-85 (Supp. 1984). He notes that the use of the dog approved in *Place* "disclosed only criminality and nothing else," *id.* at 80, and "no intrusion upon an innocent person's privacy interest occurs," *id.* at 81. Here the beeper disclosed the location of noncriminal materials within the home and invaded at least one innocent person's privacy interests. The beeper discloses a great deal more than criminality and is thus more like a traditional physical search than the *"sui generis"* dog sniff. 103 S. Ct. at 2644.

Even if it were appropriate to consider the issue for the first time in this Court,[6] there is no valid reason to make beepers an exception to the warrant clause. Counsel have found no cases requiring probable cause yet dispensing with the warrant requirement for searches except in situations involving exigent circumstances or consent.[7] The government, in fact, never advances a clear rationale for creating a beeper exception to the warrant requirement. It complains that the Court of Appeals' "holding will force agents to obtain warrants in every beeper case . . . ." (Brief 39). The obvious rejoinder is to ask what is so terrible about obtaining a search warrant, at least when, as is usually the case with beepers and was the case here, there

---

[6]The facts upon which the government relies for probable cause are not facts that it included in its affidavits for warrants in this case. The trial judge specifically found that "[o]nce the incorrect and misleading portions of the affidavit are purged . . . the remaining content is not sufficient to establish probable cause" (Pet. App. 22a). The trial judge never made a factual finding regarding the facts the government now states constitute probable cause because he ruled that "the law is clear as far as the probable cause, you can't go outside of the affidavit . . ." (J. App. 156). Even the limited fact finding done by this Court in constitutional cases would not be appropriate here because the credibility of the witnesses upon whom the government is relying for the facts has already been questioned by the trial court (J. App. 156). Furthermore, while the government asserts that "[t]he court of appeals did not question the existence of probable cause in this case" (Brief 39), the government did not claim before that court that it had probable cause.

[7]*Vale* refers to the consent exception and breaks the exigent circumstances into several categories: response to an emergency, hot pursuit, goods in the process of destruction or about to be removed from the jurisdiction. 399 U.S. at 35. *Carroll v. United States*, 267 U.S. 132, 151, 153 (1925), makes clear that the automobile exception to the warrant requirement is based on exigent circumstances—the moveability of the vehicle makes it impractical to get a warrant.

is ample time to do so. And of course exigent circumstances can sometimes excuse failure to comply with the warrant requirement. More fundamentally, the government's complaint betrays its hostility to search warrants and to the Constitution. The government expounds on its hostility to the Constitution by complaining that a "warrant requirement would necessitate compliance with various procedural technicalities . . . ." (Brief 45). This is said to raise the specter that the evidence could be suppressed and to "trivialize the Warrant Clause." (*Id.* 46). The government never explains how this is different from other situations where a warrant is required. The "various procedural technicalities" are nothing more than the requirements of the fourth amendment's Warrant Clause; to call them technicalities does not enlighten the argument although this terminology in itself may be said to "trivialize" the fourth amendment. The government's position here goes beyond the argument the government made, and the Court rejected, in *Katz:*

> The Government does not question these basic principles [of the fourth amendment]. Rather, it urges the creation of a new exception to cover this case. It argues that surveillance of a telephone booth should be exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause. We cannot agree. Omission of such authorization "bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck v. Ohio*, 379 U.S. 89, 96 (1964).

389 U.S. 347, 358 (1967) (footnote omitted).

In presenting the specter of suppression, the government argues the case that is *not* before the Court. It refers to the possibility "of an inadvertent failure to observe some procedural technicality associated with the warrant requirement." (Brief 45). As we are all aware, there are and have been other cases pending before this Court in which the effect of "inadvertent failure" is in issue. See *United States v. Leon, cert. granted,* No. 82-1771 (June 27, 1983). But here there was nothing inadvertent: the government deliberately lied to the judge.

The government also invokes the car search exception to the warrant requirement. To the great detriment of respondent Rhodes, the Court of Appeals gave the car search exception its greatest scope: every time the beeper entered a car, the respondents lost not only the protection of the warrant clause but the entire protection of the fourth amendment for whatever monitoring occurred while the beeper was in the car. 710 F.2d at 1441. The only reason to raise car searches here is to attempt to expand the car search exception into the home.

The requirement of a warrant "subject only to a few specifically established and well-delineated exceptions" is fundamental.[8] See, *e.g., United States v. Ross,* 456 U.S. 798, 825 (1982); *New York v. Belton,* 453 U.S. 454, 457 (1981); *Mincey v. Arizona,* 437 U.S. 385, 390 (1978); *Marsha'l v. Barlow's, Inc.,* 436 U.S. 307 (1978); *United States v. Chadwick,* 433 U.S. 1 (1977); *G.M. Leasing Corp. v. United States,* 429 U.S. 338 (1977). Whatever exceptions may have been made to the warrant requirement, it clearly

---

[8]*Katz v. United States,* 389 U.S. 347, 357 (1967).

retains its full validity in homes and offices (and, necessarily, in such home/office type areas as private storage lockers). See, *e.g.*, the government's argument in *United States v. Chadwick*, 433 U.S. 1, 6-7 (1977) that the warrant requirement for searches in homes, offices, and private communications lies "at the core of the Fourth Amendment." In *Chadwick* the Court was emphatic in holding that the government's view that the fourth amendment's warrant requirement was limited to these places was far too narrow. See *id.* at 6-11, 16-17 (Brennan, J., concurring), 17 (Blackmun, J., dissenting). Although the dissenting opinion in *Chadwick* noted that this unduly narrow argument "served to distract the Court from the more important task," *id.*, here the government is taking an even narrower view by contending that some non-exigent invasions of the home are not protected by the fourth amendment generally or the warrant clause particularly.

The government returns again and again to an argument that some balance should be struck that will allow it to intrude beepers into homes without a warrant and without probable cause. But:

> "The warrant requirement has been a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency."

*Arkansas v. Sanders*, 442 U.S. 753, 758 (1979) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971)).

This very case provides an example of the indiscriminate effect these devices can have on those who are not involved in or who are not the targets of the surveillance.

Here, for example, the beeper went into the home of the father of one of the respondents. (J. App. 54, 76-77). It takes little imagination to envision the inherent potential in these devices for unrestrained intrusion in the lives of innocent people. The government, in arguing for a balance that would allow it to use these devices at will, free of judicial restraint, seeks to load the balance by stressing only their utility in catching drug manufacturers and dealers. Whether this narrow focus is an intentional appeal to the emotional issue of drug trafficking, it certainly understates the capabilities, potential uses, and potential misuses of the devices. The government, like the ancient Greeks, is using the drug trade as a Trojan Horse to conceal its soldiers inside the home.

## IV. Adopting A Standard Of Reasonable Suspicion Of Criminal Activity In This Situation Would Be A Violation Of The Fourth Amendment.

The government asks this Court to adopt a standard of "reasonable suspicion that criminal activity is afoot" in all cases utilizing beepers, regardless of the intrusion involved. (Brief 37). It argues that even if monitoring the beeper under the facts of this case constituted a search or seizure under the fourth amendment, the beeper use should be considered "reasonable" if based upon reasonable suspicion as opposed to probable cause. The government cites *Terry v. Ohio*, 392 U.S. 1 (1968) and this Courts' recognition that not all police actions that qualify as fourth amendment searches or seizures are so intrusive that they require probable cause. The government cites no authority in support of its position that search or seizure into *private storage lockers* and *private residences* over an *unlimited period of time* is "reasonable" under the fourth

amendment when supported by a mere reasonable suspicion of criminal activity.

The instant case is not subject to the application of *Terry* principles. *Terry* involved the narrow authority of police officers to undertake investigative action on a public street, a limited physical intrusion for a brief period of time. The Court found even this limited "frisk" in *Terry* to constitute a "search" under the fourth amendment. The sole justification for the "search" in *Terry* was the protection of the officer, a justification not remotely arguable under the facts of the present case.

The recent decisions of this Court do not support application of *Terry* principles to the searches and seizures encountered here. *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976), dealt with routine vehicle stops at fixed checkpoints on the public roadways and detention for a few minutes. *United States v. Villamonte-Marquez,* 103 S. Ct. 2573 (1983), sanctioned the suspicionless boarding of vessels on waterways open to the sea to examine the vessel's documentation. Both involved the exigent circumstances of mobility intertwined with the customs search rationale. Neither of these exigencies are present here.

*Michigan v. Long,* 103 S. Ct. 3469 (1983), applying *Terry* principles to a weapons search of a vehicle during a lawful stop, reiterated that the allowance of searches and seizures based on reasonable and articulable suspicion is severely limited. The *Terry* "stop and frisk" doctrine comes into play only when police officers are in danger and exigent circumstances preclude resort to the judiciary. Cases decided prior to *Long* showed that only "protection of police and others can justify protective searches when

police have a reasonable belief that the suspect poses a danger." *Id.* at 3480. The search in *Long* was "restricted to those areas to which *Long* would generally have immediate control, and that could contain a weapon". *Id.* at 3481.

None of these cases presented a factual situation analogous to the present case. None addressed governmental intrusions into private areas of traditional constitutional sanctity that individuals enjoy in their homes. None addressed governmental intrusions virtually unlimited in duration. All involved exigencies that prevented access to a magistrate. The government now asks this Court to remove the traditional constitutional protections of privacy afforded the individual in a home and place him in the same position as if he were walking a public street, driving a public roadway or traveling through a public airport. This Court has traditionally rejected such attempted inroads and should do so here.

Perhaps the most remarkable of the government's analogies is to *United States v. Place*, 103 S. Ct. 2637 (1983). Although *Place* extended the *Terry* doctrine to a seizure of luggage, the touchstone of *Place* was a reaffirmaiton of the *Terry* requirement that the detention must be brief.

> The length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause. Although we have recognized the reasonableness of seizures longer than the momentary ones involved in *Terry, Adams* [*v. Williams*, 407 U. S. 143 (1972)], and [*United States v.*] *Brignoni-Ponce* [422 U.S. 873 (1975)], see *Michigan v. Summers*, [452 U.S. 692 (1981)], the brevity of the invasion of the individual's

> Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion.

*United States v. Place*, 103 S. Ct. at 2645.

The government also equates the five-month-long monitoring of the beeper from within storage lockers and homes in this case with the minimal intrusion involved in the "canine sniff" of a traveler's luggage in a public airport. (Brief 30). The *Place* decision did not question that detention of personal luggage upon reasonble suspicion of drug-trafficking was an intrusion on an individual's personal security but held that exposure of the luggage, located in a public place, to a trained narcotics detection dog did not constitute a "search" within the meaning of the fourth amendment. Therefore, no warrant was required for the canine sniff of the luggage in the first instance.

In making its determination in *Place*, the Court noted that the canine sniff of the luggage in a public place did not require opening the luggage nor did it expose ***noncontraband*** items "that otherwise would remain hidden from public view." 103 S. Ct. at 2644. The sniff disclosed only the presence or absence of the odor of narcotics, a contraband item, outside of the luggage.

The principles of the canine sniff have no application to this case. The canine sniff involves the suspected presence of only contraband items whereas the present case involves tracking a noncontraband substance removed from public view. The canine sniff generally pertains to luggage or packages located in a public place whereas the intrusions in the present case were directed into private storage lockers and homes. The canine sniff is extremely

limited in duration whereas the present case allowed intrusions into private areas for extended periods of time. The canine sniff involves a reaction to the odor of contraband present on the outside of the item, permitting the deduction that contraband is present inside the item, whereas in the present case the governmental presence, through its beepers, extended directly into areas traditionally associated with legitimate privacy expectations. The canine sniff generally involves the exigencies incident to the movement of travelers and their luggage through public areas such as airports, whereas the present case demonstrates no such exigencies. Moreover, the dogs themselves in these cases were never placed inside homes, private luggage and other protected places in order to obtain information unavailable without such an inside "detector."

In *United States v. Michael*, 645 F.2d 252 (5th Cir.) (en banc), *cert. denied* (apparently because of prematurity), 454 U.S. 950 (1981), Judge Tate's dissent prophesied the government's argument here.

> The standard that reasonable suspicion of criminal activity is a justification for a warrantless search is newly created in this case. No case is cited to support it. In oral argument government counsel were asked to supply cases supporting this theory. Counsel could come up with nothing. Sitting en banc we have the power to create this new rule subject to Supreme Court review. But there should be some better basis than the mischaracterization of the intrusion as a nickel and dime trespass, and the fact that the police were trying to catch illegal drug manufacturers. As surely as the sun rises, reasonable suspicion will now be urged as justification for intrusions that even the majority would accept as serious, and searches heretofore barred by the Fourth Amendment will be urged

> as valid because done in pursuit of all types of suspected criminal activity. In fact, few searches are made for any reason other than attempts to catch suspected law violators.

645 F.2d at 272-73 (footnote omitted).[9]

What Judge Tate feared has happened. The government now asks this Court to apply the standard of reasonable suspicion to this case where there have been several serious intrusions into the respondents' homes, into private storage units leased for the purpose of securely storing personal belongings and into their activities for a five month period. If the government is permitted to excise the entire second clause requiring probable cause and a warrant prior to a search, precious little will remain of the fourth amendment.

### V. It Is Feasible To Secure A Warrant Prior To Installing And Monitoring A Beeper.

The government argues that the use of beepers should be considered a special—new—exigent circumstance because it is not feasible to secure a warrant prior to installing or monitoring them (Brief 38). The facts in this case belie that contention. Here, the government did seek and secure a warrant. 710 F.2d at 1435. That warrant authorized the installation of a beeper into a five gallon can of ether for thirty days. The government is now before this Court arguing that a warrant is unnecessary and impractical, not because it could not secure one in this case but rather because it presented the judge with an affidavit

---

[9] In *Michael* there was no physical intrusion into a home or even into a container—the agents attached the beeper to the outside of an automobile.

that was "phony as a three dollar bill" (J. App. 156). Assuming the government had been capable of making a showing of probable cause without resort to lies, it could have secured a warrant prior to installing its beeper. There was ample time not only to obtain the warrant but for the officers to fully consult with the prosecuting attorney regarding each element of the use of the beeper.

In several other Court of Appeals cases involving beepers, the government secured warrants or warrant equivalents prior to installing its beepers. See, *e.g., United States v. Cassity*, 720 F.2d 451 (6th Cir. 1983), *petition for cert. pending*, No. 83-1393; *United States v. Butts*, 710 F. 2d 1139 (5th Cir.), *rehearing en banc granted*, No. 82-1260 (Oct. 25, 1983); *United States v. Chavez*, 603 F.2d 143 (10th Cir. 1979).

In fact, because government agents must have sufficient time to clandestinely seize the object into which they will secrete their beeper, as well as time to return this object without the suspects knowledge, there will always be enough time to secure a warrant.[10]

The government also argues that a warrant is not feasible for a beeper because it cannot fashion one that will comply with the particularity clause of the fourth amendment (Brief 12, 42). The most readily apparent defect in this argument is that it suggests throwing out the baby with the bath water. Assuming it were impossible to comply with the particularity clause (it is not), this would hardly be justification for abandoning the applica-

---

[10]Rule 41 of the Federal Rules of Criminal Procedure contains a provision for a telephone warrant making it even easier and taking almost no time.

tion of the fourth amendment altogether. Although there are numerous lower court decisions dealing with the relationship between beepers and the fourth amendment, the government has not cited a single decision that has concerned itself with the purported difficulty in complying with the particularity clause.

The government is aware that the decisions concerning electronic eavesdropping on conversations provide some analogy (see brief 41 n.15),[11] but fails to examine that analogy in this context. *United States v. Donovan*, 429 U.S. 413, 427-28, 436-37 (1977), applied the particularization requirements of *Katz v. United States*, 389 U.S. 347, 354-56 (1967) and *Berger v. New York*, 388 U.S. 41, 58-60 (1967 to conversations intercepted without having been particularized in the warrant. The Court concluded that the inability to particularize did not invalidate the interception. There is no intimation that the warrant requirement of *Berger* and *Katz* should be disregarded altogether because of an inability to particularize. In *United States v. Kahn*, 415 U.S. 143, 155 n.15 (1974), the Court held that the constitutional and resultant statutory requirements[12] were "satisfied by identification of the tele-

---

[11]This analogy is actually more helpful to the defendants than to the government. The government argues that a warrant should not be required because the warrant could not fulfill its notice function if the surveillance were to be carried out surreptitiously. Footnote 15 of the government's brief recognizes that the notice function is equally absent in warrants for electronic eavesdropping on conversations. Nevertheless, a warrant is required for that type of electronic eavesdropping.

[12]18 U.S.C. § 2518(1) (b) (1976). *See Donovan*, 429 U.S. at 427.

phone line to be tapped and the particular conversations to be seized." *Donovan*, 429 U.S. at 426 n.15. There is obviously no particularization problem associated with the installation of the beeper. Regarding the monitoring, it may be said that the locations of the beeper's container are the fourth amendment's "things to be seized." The "seizure" is the ascertainment of these locations.

Another possible solution is to analogize the situation to the procedure prescribed in 18 U.S.C. § 2517(5) (1976). That subsection allows interception and use of wiretap information relating to offenses other than those specified in the wiretap order, subject to judicial approval. The constitutionality of this subsection was considered in *United States v. Cox*, 449 F.2d 679, 684-87 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972). There the court first relied somewhat hesitantly on an analogy to the plain view doctrine. *Id.* at 686. More recent decisions, such as *Texas v. Brown*, 103 S. Ct. 1535 (1983), should dispel this hesitancy by making the scope of the doctrine clearer. The *Cox* Court also applied a simple reasonableness analysis:

> It would be the height of unreasonableness to distinguish between information specifically authorized and that which is unanticipated and which develops in the course of an authorized search . . . .
>
> . . .
>
> If wiretapping is to be validated . . . then the interception and use of information which is so related to the original search is not to be excluded.

*Id.* at 687.

In any event this Court has never read the fourth amendment to require throwing out the baby with the bath water:

> The requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement.

*Lopez v. United States*, 373 U.S. 427, 464 (1963) (Brennan, J., dissenting) quoted with approval in *Berger v. New York*, 388 U.S. 41, 63 (1967).

The government also argues that an exigency is created because their agents cannot know at the time they seek the initial warrant authorizing installation where the beeper will travel or for how long. Assuming the agents obtain a proper warrant in the first place, it should be a relatively simple matter to seek modifications or extensions as the investigation progresses.[13]

Finally, the government argues that "[a]s a practical matter" it does not improperly use beepers (Brief 32). In other words: "Trust us". Its case for trust is not convincing when, only four years after being rebuked for taking an "extreme view of the Fourth Amendment," by saying it only applies to the home[14], the government now comes into court and takes the even more extreme position that the fourth amendment does not even apply in the home. The Court previously has spoken to this contention:

> It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before

---

[13]Indeed that is precisely what happened here. The record is replete with supplemental applications for beeper orders, requests for entry tone alarms and finally, an application for a search warrant (J. App. 35-41).

[14]*United States v. Chadwick*, 433 U.S. 1, 16 (1977) (Brennan, J., concurring); see p. 17 *supra*.

> commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate.

*Katz v. United States*, 389 U.S. 347, 356 (1967).

The fourth amendment was adopted by people who did not invariably trust their own government to restrain itself from improper searches. If times or circumstances have changed to the point that we should invest the government with this trust, then the appropriate response is to change the fourth amendment, not to rely on assurances that government agents are normally to be so trusted.

This argument is especially difficult to swallow here where the very government agents we are being asked to trust made false statements under oath (J. App. 156).

## VI. The Fourth Amendment Must Flex To Meet The Challenge Of New Technology.

Beepers present the courts with the problem of applying established legal concepts to revolutionary technology. But there is a critical difference between the beeper situation and the other technological issues that have recently confronted this Court. A fitting contrast is provided by *Sony Corp. v. Universal City Studios*, 104 S. Ct. 774 (1984).

> It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written.

*Id.* at 796.

Here, the law, the fourth amendment, has already been written. Its application to the new technology is for the

judicial branch, not for the legislative branch. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). This Court should set the limits now.

As Justice Rehnquist said in *Knotts* in response to the respondent's concerns that beepers would become instruments of 24 hour surveillance, "if such dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." 103 S. Ct. at 1086 (1983). That time has come. In *Knotts* the government tracked three defendants, two automobiles and one can of chloroform for one afternoon. The government, according to the evidence in that case, could have visually followed the subject container without the beeper. In our case, the government, after invading a closed container to install the same kind of beeper, continuously invaded the private activities of six defendants, an undetermined number of uninvolved people, four houses and two storage lockers for five months. Furthermore, here the government tried and failed to keep up with the ether without the beeper.[15]

The government makes much of the truism that police efficiency does not equate with unconstitutionality. (Brief 28 n. 12). That truism, though, is not inconsistent with the more pertinent observation:

> Some may claim that without the use of such devices crime detection in certain areas may suffer some delays since eavesdropping is quicker, easier, and more certain. However, techniques and practices may well

---

[15]The government, although attempting to argue to the contrary, accepts this proposition when it says that the beeper was indispensable (Brief 36).

> be developed that will operate just as speedily and certainly and—what is more important—without attending illegality.

*Berger v. New York*, 388 U.S. 41, 63 (1967).

It is also pertinent that, in a case involving the heroin-related murder of a police officer, the Court has said:

> [T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. *Cf. Coolidge v. New Hampshire*, [403 U.S. 443, 481 (1971)]. The investigation of crime would always be simplified if warrants were unnecessary. But the fourth amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.
>
> . . .
>
> We decline to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the fourth amendment justify a warrantless search.

*Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978).

**VII. Installation Of A Beeper Requires A Warrant.**

The Court of Appeals held in this case that "before the government agents could transfer the can of ether containing a beeper to Karo, they had to obtain an authorizing warrant." 710 F.2d at 1433, 1439 (1983). There can be no doubt that the can of ether was an item in which respondents Karo, Horton, and Harley had legitimate expectations of privacy. It was a sealed container no different from a purse or a suitcase. See *United States*

*v. Ross,* 456 U.S. 798, 822 (1982). The container belonged to these defendants. 710 F.2d at 1437. "There is . . . a strong historical connection between the Warrant Clause and the initial clause of the Fourth Amendment, which draws no distinctions among 'persons, houses, papers, and effects' in safeguarding against unreasonable searches and seizures." *United States v. Chadwick,* 433 U.S. 1, 8 (1977).

The Court of Appeals held that "regardless of the consent obtained when the beeper is physically installed, an infringement of the new owner's Fourth Amendment rights begins at the time the object comes into his control." 710 F.2d at 1438 (footnote omitted). That Court's analogy to a suitcase is appropriate. Otherwise, what is there to stop government agents from installing their beepers into any object they know will go into a potential subject's possession, including books, tape recorders, or letters, that a suspect might carry with him?

The government argues that the informant's consent to installation of the beeper makes the entire search consensual because "a beeper discloses no information about the container's contents that was not already known to the agents when the beeper was installed and it discloses nothing about what a third party might have taken from or placed into the container after it came into his possession." (Brief 21, 22). The Court of Appeals responded appropriately to this simplistic analysis:

> We do not think that the analysis should end at this rudimentary level. Although the physical installation of the beeper in the can takes place before the new owner picks it up, we believe an instrusion occurs at the time the item comes into his possession. All individuals have a legitimate expectation of privacy

> that objects coming into their rightful ownership do not have electronic devices attached to them, devices that would give law enforcement agents the opportunity to monitor the location of the objects at all times and in every place that the objects are taken, including inside private residences and other areas where the right to be free from warrantless governmental intrusion is unquestioned.

710 F.2d at 1438.

We would not dispute the informant's right to notify the government of the whereabouts of the ether, nor would we dispute his right to follow the container around on public streets. *See, e.g., United States v. Knotts,* 103 S. Ct. at 1085. Similarly, we would not dispute his right to strap a tape recorder under his coat and record any conversation he may have with the respondents. *See, e.g., United States v. White,* 401 U.S. 745 (1971). But we strenuously dispute his right to place an electronic eavesdropping device inside their property or inside their homes. The fourth amendment prohibits such activity. *Katz v. United States,* 389 U.S. 347 (1967). Just as an informant could not have tapped the telephone booth that Mr. Katz used and then reported to the government on Katz' conversations, so an informant cannot consent to install a beeper on these respondents' property nor inside their homes so that police officers can search these areas.

The government misapprehends this argument when it states that "the decision in *Knotts* would be a dead letter except in those cases in which the defendant's lawyer fails to object to installation of the beeper." (Brief 23). This very case refutes the government's assertion: the objections of the lawyers for defendants who did not own the ether (Roth, Rhodes, and Steele) were to no avail. *See,*

*e.g., Rawlings v. Kentucky,* 448 U.S. 98 (1980). *Knotts* still allows warrantless monitoring of beepers on the highway, at least when there has been no invasion of the privacy interest of the driver. It follows traditional fourth amendment analysis in holding that the automobile exception and the open fields exception do not require warrants. This is consistent with the analysis of fourth amendment interests in *Wong Sun v. United States,* 371 U.S. 471 (1963). Defendants who have a privacy interest in the place of the primary illegality—the can of ether—can challenge the use of its fruits. Likewise, defendants who have an interest in the place of seizure—the Taos house—can challenge the fruits of that seizure. See 371 U.S. at 477-88.

The government also misconstrues the Court of Appeals' decision when it asserts that Respondent Karo's fourth amendment claim arises solely from the installation of a beeper without a warrant. (Brief 8, 10, 22, 23). This was *dictum* or, at most, an alternative rationale for a decision in the Court of Appeals as to Karo only. The Court of Appeals noted that Karo suffered the same in-into his home as did the other four respondents. See 710 F.2d at 1437, 1440.[16] The government ignores these facts when it states "here, respondent Karo certainly had no greater privacy interest in the location of the container than did the defendant in *Knotts.*" (Brief 22). The container with the beeper never went inside Knotts' residence. 103 S. Ct. at 1987. In our case "the signal [was] received

---

[16]The Court of Appeals correctly held that the search and seizure at the Taos house was the fruit of prior illegality, including both the installation and the monitoring of the beeper in private residences.

from the Karo residence, 1108 Monroe." (Testimony of DEA Agent Richard Rottinger, J. App. 120).

Furthermore, there is absolutely no evidence in this case that "as was the case in *Knotts*, the same information could have been obtained by direct visual surveillance." (Brief 22). In fact, the evidence is to the contrary. According to the affidavit for search warrant the officers used visual surveillance to follow Karo to his home with the ether. Although visual surveillance continued, it ceased to be effective at that point.

> After about an hour, we observed the vehicle (in which the cans were located 19-20 September 1980 in the public street) as it returned to the vicinity of Graphic Photo Design, and we no longer saw the cans of ether in the vehicle. Additionally, using a "beeper" locator (direction finder) we determined that at least the can with five gallons of ether in the beeper can was located at 1108 Monroe, SE, Albuquerque. [Karo's residence].

(J. App. 54).

Therefore, as to Karo, Horton and Harley, there were two fourth amendment violations: First, when the sealed ether can containing personal property belonging to the three of them came into their possession they were entitled to receive it in a private condition without the beeper. Second, they, along with the other respondents, were entitled to freedom from warranteless invasions into their homes and private storage lockers.

### VIII. The Decision Should Be Affirmed Because Of The Government's Outrageous Conduct.

Although the courts below have not yet ruled on it, respondents have consistently insisted that the evidence

should be suppressed because of the misconduct of the government in coming into a Federal District Judge's chambers and lying to obtain a search warrant. This contention has been based on the due process concept of outrageous government conduct and on the inherent supervisory powers of the courts. It is appropriate for consideration here "because the prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted." *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n. 8 (1977).

The supervisory power of the federal courts permits them "to supervise 'the administration of criminal justice' among the parties before the bar." *United States v. Payner*, 447 U.S. 727, 735 n.7 (1980) (citation omitted). This power includes the exclusion of evidence taken from a defendant by the "willful disobedience of law." *McNabb v. United States*, 318 U.S. 332, 345 (1943).

Here the district judge found:

> As far as the affidavit, I will say possibly there are not too many outright blatant falsehoods, but as a result of half-truths, innuendos, deliberate attempt to create an impression other than the actual fact, my view is that the original affidavit, as putting it bluntly, is as phony as a three dollar bill. And then you have not only that, that it was deliberately conceived to give a false impression, and I might add, a good job was done in that regard. Reading of that affidavit, you come out with a far different impression of the facts than the actual truth.

(J. App. 156.)

In *United States v. Cortina*, 630 F.2d 1207 (7th Cir. 1980), as here, the government lied in its application for

a search warrant, although the United States Attorney's Office did not directly participate in the lie. The holding there will be quoted at length because it well states the argument:

> *Our holding is therefore simple—we will not allow or condone reckless or deliberate misrepresentations made to magistrates.* But we note that our holding is not based merely on abhorrence of Agent Brown's conduct, for that would not justify use of our power to suppress the evidence. *United States v. Payner,* . . . 100 S.Ct. at 2444. We recognize that the federal supervisory power does not give "the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it [does] not approve." *United States v. Russell,* 411 U.S. 423, 435 . . . (1973). *But we do not merely disagree with the method of law enforcement attempted here; rather, we are preventing the court from condoning a fraud perpetrated upon it.* To allow this evidence to be used at trial would make the federal courts "accomplices in the willful disobedience of a Constitution they are sworn to uphold." *Elkins v. United States,* 364 U.S. at 223 . . . .
>
> There should be no compromise with the principle that agents of the United States cannot be permitted to manipulate the judicial system to circumvent constitutional requirements. . . .
>
> The recent decision of *United States v. Payner,* . . . 100 S. Ct. 2439 . . . (1980), does not mandate a different result. In fact, upon analysis, the *Payner* decision supports the conclusion we have reached.
>
> . . .
>
> The Supreme Court emphasized that its decision in *Payner* "does not limit the traditional scope of the supervisory power in any way." . . . 100 S. Ct. at 2446. The cornerstone of *Payner* was that the evidence was seized from "a third party not before the court." . . . 100 S. Ct. at 2446 n. 8. . . .
>
> . . .

By invoking the doctrine of legitimate expectation of privacy under our circumstances, the government would interpret *Payner* to hold that the scope of the supervisory power is identical to that of the Fourth Amendment. But had it so held, *Payner* would have rendered the supervisory power superfluous in cases involving searches and seizures, a result the Supreme Court expressly rejected. . . . *Application of the supervisory power is limited to situations where there has been a fraud upon the court in addition to a violation of the defendant's rights.* . . .

The need for deterrence of illegal conduct is, in one sense, greater here than it was in *Payner*, for [FBI Agent] Brown's offense was committed within the sancity of the court itself. *The violation here is particularly insidious because it is difficult to uncover misrepresentations in an affidavit underlying a search warrant.* The information needed to prove such assertions false is peculiarly within the hands of the government. . . .

The call to protect our judicial integrity, the second interest to be weighed, is particularly strong here because Brown's misconduct compromised judicial procedures mandated by the Constitution. . . . Unless officers of the law know that the consequences of deliberate misrepresentations will be the suppression of the evidence, "lawless or reckless misconduct" will not only be encouraged, but invited. . . . *Courts must act in their own self-defense against brazen violations of their procedures.* We must draw the line at misconduct occurring within our own house.[17].

Weighed against these two interests is the detrimental effect of excluding the evidence. The Court in *Payner* expressed concern that "unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably

---

[17] *Cf. United States v. Janis*, 428 U.S. 433, 458-59 n.35 (1976) ("courts must not . . . encourage violations of the constitution.")

> the truth-finding functions of judge and jury." . . . 100 S.Ct. at 2445-46. Here, however, it is that truth-finding function itself which has been corrupted, not because of suppression, but because of the lies told to the magistrate. The truth-finding functions of that magistrate are vindicated, not impeded, by suppression, here.
>
> Our standard is plain: when the government lies to the magistrate in securing a warrant to the extent that there is no probable cause for the search, and when that search results in the seizure of evidence, this Court will suppress the evidence.

630 F.2d at 1214-17 (footnotes omitted, emphasis added).

It has long been the rule that the prosecution's knowing use, at trial, of perjured testimony will require reversal of the conviction. See *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). This is so even when the government merely allows an unsolicited falsehood to go uncorrected. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). These rules are based on the due process clause. If for any reason this Court felt the supervisory power would be inapplicable in this case, then due process should require affirmance. It is difficult to distinguish between the situation where the prosecution lies to the judge and the situation where the prosecutor allows a witness to lie to the jury. If a difference exists, it is more reprehensible here where the prosecutor directly participated in the lie. Chief Justice Hughes referred to "the duty of the court to stop the prosecution in the interest of the Government itself, to protect it from the illegal conduct of its officers and to preserve the purity of its courts." *Sorrells v. United States*, 287 U.S. 435, 446 (1932).

The fraud in this case included wording the affidavits so it would appear to the Court that the focus of the search

was an amphetamine laboratory. (J. App. 43-44). In fact, the agents knew from the very beginning of their investigation that they would be attempting to find a laboratory where cocaine would be extracted from clothing. (J. App. 103). This is similar to the factual setting in *United States v. Rettig,* 589 F.2d 418, 422 (9th Cir. 1978) where failure to accurately describe these circumstances to the judicial officers, in essence, created a general search because the court could not determine its proper scope.

The judge is more important to the functioning of the courts than is the grand jury. Yet a conviction was set aside in *United States v. Hogan,* 712 F.2d 757 (2d Cir. 1983) because the Assistant United States Attorney participated in misleading the grand jury. "Taking advantage of his special position of trust, the AUSA impaired the grand jury's integrity as an independent body." *Id.* at 762. *United States v. Hasting,* 103 S. Ct. 1974 (1983), with its emphasis on harmless error, did not prevent the exercise of supervisory power because without the misleading presentation "appellants might not have been indicted." 712 F.2d at 762 n.2.

*Hasting* leaves the doctrine fully available here. Judicial integrity is much more at stake when a federal agent, with the help and guidance of an Assistant United States Attorney, lies under oath to a judge. Suppression, a remedy more narrowly tailored than dismissal, is an appropriate deterrent. Each defendant has a personal due process right not to have his prosecution initiated by deliberate governmental fraud upon the judiciary. *Cf.* 103 S. Ct. at 1978.

Thus, even if this Court agrees with the government that one or all of these defendants have not exhibited a legitimate expectation of privacy, two unmistakable facts remain: an egregious fraud has been perpetrated on the federal judiciary and these defendants' rights have been violated by that fraud. This Court, in the interest of preserving the integrity of the judiciary, should affirm the suppression of this evidence.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

NANCY HOLLANDER
Freedman, Boyd & Daniels, P.A.
20 First Plaza, Suite 212
Albuquerque, NM 87102
(505) 842-9960

Counsel for Respondent Karo

REBER BOULT
1412 Lomas Blvd., NW
Albuquerque, NM 87104
(505) 842-0392
Counsel for Respondent Roth

JAMES BEAM
715 Tijeras, NW
Albuquerque, NM 87102
(505) 842-5924

Counsel for Respondent Steele

Office - Supreme Court, U.S.
FILED
APR 1 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-850

In The
# Supreme Court of the United States
October Term, 1983

UNITED STATES OF AMERICA,

*Petitioner,*

vs.

JAMES CONNORS KARO, ET AL.,

*Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

## BRIEF FOR RESPONDENTS HARLEY AND HORTON

WILLIAM MARCHIONDO
MICHAEL VIGIL
*Attorneys for Respondent*
RICHARD MILES HORTON
P.O. Box 568
Albuquerque, New Mexico
87103
(505) 247-0731

JOSEPH (SIB) ABRAHAM, JR.
CHARLES LOUIS ROBERTS
*Attorneys for Respondent*
WILLIAM R. HARLEY
P.O. Box D
El Paso, Texas 79951-0004
(915) 544-7860

COCKLE LAW BRIEF PRINTING CO., (800) 833-7427 Ext. 333

## QUESTIONS PRESENTED[1]

1. Whether warrantless installation of a beeper inside a container of chemicals with the consent of the original owner violates the Fourth Amendment rights of a suspect in a drug manufacturing scheme to whom the container is subsequently transferred.

2. Whether the warrantless monitoring of signals from a beeper installed inside a container of chemicals that law enforcement authorities reasonably believe will be used to manufacture illegal drugs violates the Fourth Amendment when the monitoring occurs while the beeper is located within a home or other "private" area (such as a commercial storage locker).

---

[1]Respondents, [illegible]LEY and HORTON, have objected to the formulation of the issues by the Government; have proposed reformulations consistent with this Court's landmark case of *Katz* v. *United States*, 389 U.S. 347, 350-351 (1967), (Resp. ii, 2-4); and continue to object. This writer would also point out that the surplusage in the questions presented is factually inaccurate. This is not a "drug manufacturing scheme" nor did the Government reasonably believe that it was, (J.A. 102-103; see "Statement", *infra*).

## REFORMATIONS OF THE QUESTIONS PRESENTED AS REURGED BY RESPONDENTS

1. Whether a citizen has a reasonable expectation of privacy in a sealed chattel expected to be delivered to him that would be abridged by the warrantless insertion of an electronic signalling device which was intended for the purpose of monitoring the movements of that chattel after it came into his possession.

2. Whether a citizen has a reasonable expectation of privacy that would be abridged by the warrantless operation and monitoring of an electronic signalling device secreted within his or her personal property located inside his or her residence or other private area.

TABLE OF CONTENTS


| | Pages |
|---|---|
| QUESTIONS PRESENTED | i |
| REFORMATIONS OF THE QUESTIONS PRESENTED AS REURGED BY RESPONDENTS | ii |
| STATEMENT | 1 |
| SUMMARY OF ARGUMENT | 6 |
| ARGUMENT | 9 |
| I. The Warrant Requirement of the Fourth Amendment Should be Applied to Both the Installation of an "Beeper" in Items of Personal Property and to the Monitoring of a "Beeper" Within Private Residences and Other Private Areas. | 10 |
| A. The Fourth Amendment Evidences a Strong Preference for Warrants to Authorize Searches. | 10 |
| 1. Such Preference for Warrants Extends to Items of Personal Property Such as Containers. | 12 |
| 2. An Even Stronger Preference for Warrants Protects Private Residences and Other Private Areas. | 13 |
| B. There are no Constitutionally Compelling Reasons why an Exception to the Warrant Requirement Should be Established to Allow Warrantless Installation of a "Beeper" in an Item of Personal Property or to Allow Warrantless Monitoring of a "Beeper" Within Private Residences and Other Private Areas. | 14 |
| 1. The Invasions in Question are Significant Enough to be Considered Searches Under the Fourth Amendment. | 14 |

TABLE OF CONTENTS—Continued

Pages

2. The Circumstances of "Beeper" Surveillance do not support the Creation of a New Exception to the Warrant Requirement. ____ 20

3. Obtaining a Warrant is not Only Feasible but Beneficial in "Beeper" Cases ____ 23

4. Unfettered Installation and Monitoring of "Beepers" and Other Surveillance Devices Poses a Significant Danger to the Republic and its Citizens. ____ 25

C. The Decision of this Court in *Knotts* is Consistent With the Application of the Warrant Requirement to "Beeper" Installation Into Private Property and to "Beeper" Monitoring Within Residences or Other Private Areas. ____ 28

II. Should the Fourth Amendment not Compell Suppression in this Cause, the Evidence Should Still be Suppressed in Order to Protect the Integrity of the Court Through Use of Its Supervisory Powers. ____ 31

CONCLUSION AND PRAYER ____ 33

TABLE OF CITATIONS

CASES:

*Adams v. Williams*, 407 U.S. 143 (1972) ____ 21

*Berger v. New York*, 388 U.S. 41 (1967) ____ 36

*Boyd v. United States*, 116 U.S. 616 (1886) ____ 11

*Camara v. Municipal Court*, 387 U.S. 523 (1967) ____ 11

*Davis v. Mississippi*, 394 U.S. 721 (1969) ____ 18

TABLE OF CITATIONS—Continued

Pages

*Dunaway v. New York*, 422 U.S. 200 (1979) ——— 22

*Ex Parte Jackson*, 96 U.S. 727 (1878) ——— 12

*G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977) ——— 6, 13

*Gouled v. United States*, 255 U.S. 298 (1921) ——— 15

*Johnson v. United States*, 333 U.S. 10 (1948) ——— 6, 10, 11, 30

*Katz v. United States*, 389 U.S. 347 (1967) ——— 7, 10, 15, 17, 29, 34, 36, 37

*McNabb v. United States*, 318 U.S. 332 (1942) ——— 9, 32

*Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978) ——— 13

*Mincey v. Arizona*, 437 U.S. 385 (1978) 6, 8, 12, 13, 21, 22, 23

*N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1948) ——— 34

*Payton v. New York*, 445 U.S. 573 (1980) ——— 10, 13

*Pennsylvania v. Mimms*, 434 U.S. 106 (1969) ——— 21

*Silverman v. United States*, 365 U.S. 505 (1961) ——— 13

*Smith v. Maryland*, 442 U.S. 735 (1979) ——— 16

*Tehan v. Shott*, 382 U.S. 406 (1966) ——— 34

*Terry v. Ohio*, 392 U.S. 1 (1968) ——— 7, 8, 14, 16, 21, 22

*Torres v. Puerto Rico*, 442 U.S. 465 (1979) ——— 12, 13, 21

*United States v. Bailey*, 628 F.2d 938 (6th Cir. 1980) ——— 15, 30

*United States v. Bernard*, 625 F.2d 854 (6th Cir. 1980) ——— 29

*United States v. Brock*, 667 F.2d 1311 (9th Cir. 1982), cert. denied, No. 81-6922 (Mar. 7, 1983) ——— 29, 30

*United States v. Bruneau*, 594 F.2d 1190 (8th Cir.) cert. denied, 444 U.S. 847 (1979) ——— 29

TABLE OF CITATIONS—Continued

Pages

*United States v. Butts*, 710 F.2d 1139 (5th Cir. 1983) reh. granted ..... 30

*United States v. Cassity*, 720 F.2d 457 (6th Cir. 1983), Slip Opinion Nos. 81-1565 et seq. (October 31, 1983) ..... 30, 31

*United States v. Chadwick*, 433 U.S. 1 (1977) ..... 6, 8, 11, 12, 22, 29

*United States v. Clarke*, 451 F.2d 584 (5th Cir. 1971) ..... 16

*United States v. Clayborne*, 584 F.2d 346 (10th Cir. 1978) ..... 15, 29

*United States v. Cortina*, 630 F.2d 1207 (7th Cir. 1980) ..... 33

*United States v. Dubrofsky*, 581 F.2d 208 (9th Cir. 1978) ..... 16

*United States v. Frisbie*, 550 F.2d 335 (5th Cir. 1977) ..... 16

*United States v. Karo*, 710 F.2d 143 (10th Cir. 1983) ..... 5, 12, 13, 14, 15, 25, 28, 29, 30, 31, 37

*United States v. Knotts*, 662 F.2d 515 (8th Cir. 1981) Rev'd on other grounds 103 S.Ct. 1081, 77 L.Ed.2d 55 (1983) ..... 15, 24, 28, 29, 30, 31

*United States v. Lewis*, 621 F.2d 1382 (5th Cir. 1980) ..... 29

*United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) ..... 20, 21, 22

*United States v. Michaels*, 645 F.2d 252 (5th Cir. 1981), cert. denied 454 U.S. 950 ..... 30

*United States v. Mendenhall*, 446 U.S. 544 (1980) ..... 20, 21, 22

TABLE OF CITATIONS—Continued

Pages

*United States v. Moore*, 562 F.2d 106 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978) ..... 15, 29, 30

*United States v. New York Telephone Co.*, 434 U.S. 159 (1977) ..... 9, 31

*United States v. Payner*, 447 U.S. 727 (1980) ..... 32

*United States v. Place*, 77 L.Ed.2d 110 (1983) ..... 10, 22

*United States v. Portillo-Reyes*, 529 F.2d 844 (9th Cir. 1975) ..... 16

*United States v. Ross*, 456 U.S. 798 (1982) ..... 10, 12

*United States v. Steagald*, 451 U.S. 204 (1981) ..... 13

*United States v. Van Leeuwen*, 397 U.S. 249 (1970) ..... 12

*Weeks v. United States*, 232 U.S. 383 (1914) ..... 10

OTHER AUTHORITIES:

U.S. Constitution, Amend. IV ..... *passim*

18 U.S.C. 2510 et seq. ..... 6, 11, 12, 15, 23

II Hale, *The History of the Pleas of the Crown*, pp. 149-52 (1st Am.Ed. 1847) ..... 10

Landynski, *Search and Seizure and the Supreme Court*, pp. 20-48 (1937) ..... 10, 11

Larson, *The History and Development of the Fourth Amendment to the United States Constitution*, 13 et seq. (1937) ..... 11

Gales, *Debates and Proceedings in the Congress of the United States*, Vol. I (Washington: Gales and Seaton 1834), at Col. 448-449 ..... 33

*U.S.S.R. Constitution*, Article 55 ..... 38

No. 83-850

In The

# Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,

*Petitioner,*

vs.

JAMES CONNORS KARO, ET AL.,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF FOR RESPONDENTS HARLEY AND HORTON

### STATEMENT

This is a case involving a criminal investigation in Albuquerque, New Mexico where the Government suspected that a certain shipment of ether was destined to be utilized in a plan to "precipitate [cocaine] out of clothes" which had been "brought in [to the country]," (J.A. 103). This

suspicion was based on information received prior to September, 1980 from a confidential informant named MUEHLENWEG (J.A. 102-103). The ether was purchased by MUEHLENWEG acting as an agent for Respondents KARO, HARLEY, and HORTON, who had jointly contributed to the purchase price, (J.A. 145-146). On September 10, 1980, Assistant U. S. Attorney BLACKMER and DEA Agent ROTTINGER applied to obtain a warrant[2] from U. S. District Judge MECHEM which would allow them to implant a "beeper" in one of the cans of ether, (J.A. 42). In the affidavit supporting the application (which was a collaborative effort on the part of both BLACKMER and ROTTINGER, see J.A. 124, 129-130), Agent BLACKMER swore: (1) that MUEHLENWEG was the target of the investigation; (2) that amphetamine manufacturing was the subject of investigation; and (3) that the suspicions of the Government had been corroborated by the discovery of amphetamine manufacturing schemes of MUEHLENWEG and his associate LOGAN, (J.A. 43-45). The Court authorized the "beeper" installation by an order limited to thirty days (extensions were sought and granted). Declining to "install" a beeper in the shipment, the Federal Agents replaced one of the ether drums with one of their own drums containing a "beeper,"[3]

---

[2]This application for a warrant which was substantially similar to that required for TITLE III electronic surveillance was apparently undertaken under a policy of the New Mexico U.S. Attorney's office to use "Title III" as a "guideline" for obtaining electronic signalling devices (J.A. 133-134).

[3]The order only authorized installation (Gov. Ex. 5; J.A. 72-75); however, the agents substituted a Government drum complete with "beeper" instead, (J.A. 72-75).

later delivering the entire shipment to MUEHLENWEG who later delivered it to KARO. After installation and delivery of the "beeper", the Federal Agents time and time again eschewed visual surveillance in favor of the electronic signals which were used to follow the ether throughout the city into five separate residences and two private storage lockers during over five months of surveillance, (Pet. Brief at 5-6). The Federal Agents lost track of the drum several times and only by use of the "beeper" were the agents able to resume surveillance, (Pet. Brief at 5-6). Finally, in February of 1981, the Federal Agents tracked the ether to a residence in Taos, New Mexico where a search warrant was executed which resulted in the arrests of Respondents HARLEY, HORTON, STEELE, and ROTH, (J.A. 48, 63-65), and the seizure of a large amount of cocaine, (J.A. 48, 63-65).

At a subsequent hearing on a Motion to Suppress filed by Respondents, the Government admitted that, at the time of obtaining the "beeper" installation warrant, Assistant U.S. Attorney BLACKMER and DEA Agent ROTTINGER knew the following: (1) that MUEHLENWEG was not the target although the Government did know the names of those who were the actual targets; (2) that the Government suspected a scheme to "precipitate . . . [cocaine] out of clothes . . . brought in;" and (3) that the prior amphetamine manufacturing schemes of MUEHLENWEG and his associate were not related to this investigation nor to the actual targets, (J.A. 103)[4]. At hear-

---

[4]DEFENSE COUNSEL: Just to clarify, Agent HASTINGS, we were discussing earlier in my examination, the investigation with respect to LOGAN and the investigation which resulted in

(Continued on next page)

ing, the Government defended this affidavit as a legitimate method to shield the confidential informant status of MUEHLENWEG (J.A. 136-137), and further represented that U. S. District Judge MECHEM was a party to the deception because BLACKMER and ROTTINGER testified that they made unsworn and unrecorded representations to Judge MECHEM, informing him of the confidential informant status of MUEHLENWEG although omitting the other inaccuracies, and convincing him to issue the warrant upon the false affidavit (J.A. 116-117, 126). Defense Counsel interviewed Judge MECHEM and proffered evidence to the Court that the Judge did not remember such remarks, (J.A. 144). Further, in defense, BLACKMER claimed that he resorted to the misleading affidavit when he found that MUEHLENWEG'S cousin worked in the U. S. Magistrate's office downstairs. However, at no time did BLACKMER explain why he thought that the cousin would have access to a sealed affidavit in District Court, (J.A. 130, et seq.). The Government later brought out testimony that there was no "genuine concern" that MUEHLENWEG'S status as an informer would be disclosed from a "sealed" affidavit in the U. S. District Court.[5]

---

(Continued from previous page)

this prosecution. Those two investigations were unrelated, were they not? AGENT HASTINGS: Yes, sir. (J.A. 103) • • • AGENT ROTTINGER: In the initial case opening of this investigation, it was understood from Carl MUEHLENWEG that KARO would acquire ether and then turn it over to HARLEY and HORTON for an extraction process of cocaine. (J.A. 119) • • • THE COURT: At that time you knew of the KARO, HARLEY and HORTON. AGENT ROTTINGER: I knew of those names, yes, sir. THE COURT: Now, in addition, you knew Mr. MUEHLENWEG had told you that this investigation on your part would involve cocaine and not amphetamines, isn't that correct? AGENT ROTTINGER: Correct. (J.A. 119)

[5]PROSECUTOR: I want to leave no misimpression or suggestion to the contrary, Mr. BLACKMER. You have utterly no

(Continued on next page)

Following this hearing, United States District Judge BRATTON suppressed the evidence gained in the search of the Taos house as fruits of the unlawful warrantless installation and monitoring of the "beeper" (J.A. 155-158), and later denied the Government's Motion to Reconsider (Pet. App. 16a-23a). An appeal was taken by the Government in which the Government argued that neither the installation nor the monitoring of the "beeper" required a warrant, (Appellant's Brief 1 et seq.).[6]

The Court of Appeals for the Tenth Circuit affirmed the District Court, holding that the warrantless installation violated the Fourth Amendment, *United States v. Karo*, 710 F.2d 1433, 1438 (10th Cir. 1983).

The Tenth Circuit also held that the warrantless monitoring of the beeper inside homes and other private areas was also a violation of the Fourth Amendment, *Karo*, 710 F.2d at 1440.

---

(Continued from previous page)

reason to believe, either through laxness or otherwise, that anyone in the Court offices might inadvertently let these things become public, that's not a genuine concern? ASST. U.S. ATTORNEY BLACKMER: Not a genuine concern, but it can happen, something [266] could be unsealed or somebody, maybe for dishonest purposes, goes in and takes off the — PROSECUTOR: But you have no reason at all to suspect that in this case, do you? ASST. U.S. ATTORNEY BLACKMER: No, not in this case and not in general in this Federal Court. (J.A. 141-142)

[6] However, the Government did not argue below that the affidavit was valid; or that probable cause existed outside the affidavit (Appellant's Brief 1 et seq.).

## SUMMARY OF ARGUMENT

The Respondents argue that the warrant clause of the Fourth Amendment should be applied to both installation and monitoring of the devices known as "beepers", *U.S. Constitution*, Amend. IV. This is because historically and legally the warrant requirement has been an essential element of our national experience. For example, the abuses of a general warrant were a primary cause of our armed struggle for independence. In our own time the Fourth Amendment is an essential element in the bulwark drawn around the rights of privacy enjoyed by every citizen. The reasons underlying the warrant requirement: (1) the undesirability of allowing the sanctity and privacy of the home, person, and effects, to rest upon the hurried decision of a law enforcement officer; *Johnson v. United States*, 333 U.S. 10, 14 (1948); (2) the desirability of leaving the sanctity and privacy of the home, person, and effects under the safeguard of a neutral and detached magistrate passing upon the reasons for such intrusion, *Johnson*, 333 U.S. at 14; (3) the desirability of making it less likely that a search once begun would not exceed proper limits bounds; *United States v. Chadwick*, 433 U.S. 1, 9 (1977); and (4) the desirability of providing post-search notice in a surreptitious search situation: (a) that a search did occur, (b) who conducted it?, (c) under what authority?, and (d) under what limits? (see 18 U.S.C. 2510 et seq.). There has been no showing that these concerns are any less valid in our modern setting or in the context of a "beeper" search. Since this Court has made the warrant requirement applicable to containers, *Chadwick, supra* and even more applicable to homes, *Mincey v. Arizona*, 437 U.S. 385 (1978), and other private areas, *G.M. Leas-*

*ing Corp. v. United States*, 429 U.S. 338 (1977), the Respondents would argue that the warrant clause must be applied. This is especially so in our case where we have an actual physical trespass for five months within both containers and homes, etc., which could have gained and actually did gain significant information for the investigations.

The Government's arguments in favor of exempting "beeper" searches from the warrant clause on the grounds that the invasions in question were not significant enough to be considered a search under the Fourth Amendment rests in large part on the idea that a beeper installation is a minimal search which gains minimal fruit. The concept that a minimal search is still a search was established by *Terry v. Ohio*, 392 U.S. 1 (1968). The actual physical trespass into a protected area coupled with an intention to gather evidence or gain information must be considered a search, *Katz v. United States*, 389 U.S. 347 (1967). The Government's analogies to dog sniffing and binocular cases are inapposite because it is the machine *which monitors the beeper* that is analogous to the binocular or the dog's nose and the Respondents do not complain of that device. The only proper analogy would be an odor enhancing device or a device which enhanced visibility secreted *inside* a container or a structure. This would not be constitutionally permissible *Katz, supra.* And the fruits in this case were not minimal. Indeed, in the proper case "beeper" evidence as to how long an object was at a place or when an object was at a place could be an important factor in investigations or even trials. The fact is that the "beeper" search provided more infor-

mation than visual surveillance. The "beeper" told the agents that the drum was in locker No. 15 thus allowing them to follow it to the situs of the laboratory. If visual surveillance were utilized, the drum could have been in any one of a hundred locations and the agents would have lacked probable cause as to any specific location. Thus the search involved: (1) an actual trespass to gain information; (2) invasion of containers and homes, etc., where an expectation of privacy exists, *Chadwick, Mincey;* and (3) obtaining significant information.

The Government asks in the alternative that it be allowed to install and monitor beepers under an expectation to the warrant clause which would only require reasonable suspicion. However, the fact that the search is somewhat limited in intensity cannot bring this case within the *Terry* line of cases because of the five month duration and the seven locality expanse. In addition, the *Terry* line of cases all require some sort of exigent circumstances which make getting a warrant not feasible. Here, the agents easily obtained a warrant which could serve as a model for "beeper" warrants save for the fact that the Government lied in its affidavit, a situation which hopefully can be rectified in other cases.

It is also of grave concern to Counsel that the absence of the warrant requirement would render the Court and the public ignorant of the actual extent of Government beeper surveillance except as to the comparatively rare cases: (1) where there was a subsequent criminal prosecution; and (2) where the Government had to use evidence gained from beepers or otherwise disclose that they had "beepered." Otherwise, domestic surveillance

and other undisclosed beepers could continue to proliferate without check, unnoticed by both its guilty and its innocent victims. As beepers and their progeny are technologically capable of making every object and person a transmitter of tell-tale signals, the capacity is there for a surveillance state. Most activities now protected by the Bill of Rights would be "chilled" by unactivated beepers or monitored by activated beepers. For these reasons the general warrant requirement should apply.

Additionally, the Respondents call for suppression of the evidence under the Court's supervisory powers as an alternate ground, *United States v. New York Telephone Co.*, 434 U.S. 159 (1977). We cannot reward the Government for concocting a false warrant by granting them a new exception to the Fourth Amendment's requirement for warrants, *McNabb v. United States*, 318 U.S. 332 (1942).

## ARGUMENT

The Government asks this Court to extend to it the right to install electronic signalling devices or "beepers" inside the property and effects of its citizens and also to extend to it the right to monitor those devices wherever they may be taken, whether home, office, or highway. In response, the Respondents agree that the Government should have the ability to obtain such rights. The Government asks that it be able to exercise these rights solely upon its own discretion and judgment. In response, the Respondents disagree and ask that the exercise of such

rights be conditioned upon securing a warrant from a neutral magistrate.

## I. THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT SHOULD BE APPLIED TO BOTH THE INSTALLATION OF A "BEEPER" IN ITEMS OF PERSONAL PROPERTY AND TO THE MONITORING OF A "BEEPER" WITHIN PRIVATE RESIDENCES AND OTHER PRIVATE AREAS.

### A. The Fourth Amendment Evidences a Strong Preference for Warrants to Authorize Searches.

This Court has recognized that the warrant requirement contained in the Fourth Amendment is the rule rather than the exception in enforcing "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," *U.S. CONST.*, Amend. IV.[7]

Indeed this overriding preference for a specific and particular judicial warrant not only runs through the course of our legal history in England and America, *Weeks v. United States*, 232 U.S. 383, 391-393 (1914); *Johnson v. United States*, 333 U.S. 10, 13-14 (1948); II Hale, *The History of the Pleas of the Crown*, pp. 149-52 (1st Am.Ed. 1847); Landynski, *Search and Seizure and*

---

[7]The Government's contention that: "Neither the language nor the history of the Fourth Amendment reflects any intention to require warrants as a condition to a lawful search and seizure," Pet. *Brief* at 14, is belied by history, and by the holdings of this Court, "searches conducted outside judicial process . . . are *per se* unreasonable . . .," *Katz v. United States*, 389 U.S. 347, 357 (1967); same, *United States v. Ross*, 456 U.S. 798, 810-811 (1982); "*per se* unreasonable . . . unless . . . accomplished pursuant to judicial warrant . . .," *United States v. Place*, 77 L.Ed.2d 110, 116-117 (1983); see also *Payton v. New York*, 445 U.S. 573, 583-584 (1980). The Government's position appears to ask that the rule (of the warrant requirement) be made the exception and that the exceptions be made the rule.

*the Supreme Court*, pp. 20-48 (1937), but is also declared to be the catalytic agent by which our struggle for independence and hence our nation were created. *Boyd v. United States*, 116 U.S. 616, 625 (1886); Landynski, *Search and Seizure*, at 34-37; Larson, *The History and Development of the Fourth Amendment to the United States Constitution*, 13 et seq. (1937). Aside from history and precedent, the legal reasoning underpinning this warrant requirement is as vital and valid today as when first stated The bases most often alluded to by the Courts include: (1) the undesirability of allowing the sanctity and privacy of the home, person, and effects, to rest solely upon the hurried decision of a law enforcement officer "engaged in the often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948); (2) the desirability of leaving the sanctity and privacy of the home, person, and effects under the safeguard of a neutral and detached magistrate passing upon the reasons for such intrusion, *Johnson*, 333 U.S. at 14; and (3) the desirability of making it less likely that a search once begun would "not exceed proper bounds," *United States v. Chadwick*, 433 U.S. 1, 9 (1977).[8] There is no wonder that this

---

[8]A further rationale supporting the warrant requirement is "notice or assuring" that the individual whose property is to be be searched or seized of the "proper authorization" of the executing officers, his need to search, and the "lawful limits" of his power to search. *Camara v. Municipal Court*, 387 U.S. 523, 532 (1967). While the Government is correct in stating that pre-search notice is not present in a covert "beeper surveillance" case, Pet. *Brief*, at 41, the warrant would give post-search notice that search had in fact occurred, who conducted it, for what cause, and under what limits. Thus, it would serve the same salutory purposes as a warrant posted on a citizen's door giving notice of a search performed in his or her absence, or as a warrant disclosed after the fact in Title III Surveillance, 18 U.S.C. 2510.

Court has repeatedly and often "unanimously rejected" attempts to ignore this strong preference for warrants, *Ross*, 456 U.S. 810-811,[9] and indeed the wonder is that the Government again brings this issue before the Court. There has been no showing by the Government that our modern police are any less zealous and thus a neutral magistrate is any less salutory as a safeguard of the sanctity and privacy of home, person, and effects. Likewise, there has been no showing that the need to define and enforce at least some limitations in the extent of a beeper search is not desirable nor beneficial in a Fourth Amendment context.[10]

**1. Such Preference for Warrants Extends to Items of Personal Property Such as Containers.**

This long established warrant requirement has been held applicable to packages, luggage, and other containers, *Ex Parte Jackson*, 96 U.S. 727, 733 (1878); *United States v. Van Leeuwen*, 397 U.S. 249 (1970); *United States v. Chadwick*, 433 U.S. 7-11. The Trial Court and the Tenth Circuit in *Karo* held that the ether drum was a container protected by the Fourth Amendment and thus applied the warrant requirement against the intrusion of the "beeper", *Karo*, 710 F.2d 1437-1439. In applying the warrant requirement, the Tenth Circuit Court reasoned

---

[9]See also *Mincey v. Arizona*, 437 U.S. 385, 390-393 (1978); *Torres v. Puerto Rico*, 442 U.S. 465, 470-474 (1979).

[10]Again, the limitations of Title III Surveillance warrants regarding duration, purposes, etc. are helpful as a general model, although many of the other special requirements for Title III Surveillance would neither be necessary nor relevant. 18 U.S.C. 2510, et seq.

that any citizen has an "expectation of privacy that objects coming into their rightful possession do not have electronic devices attached to them" which betray presence and movement, *Karo*, 710 F.2d at 1438. This is but common sense.

### 2. An Even Stronger Preference for Warrants Protects Private Residences and Other Private Areas.

The warrant requirement has been even more strictly applied to intrusions within homes, offices, and other private areas, *United States v. Steagald*, 451 U.S. 204, 217-222 (1981). And if there ever was a "bright line" in the Fourth Amendment context it is drawn squarely across the doorway of the home. "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion," *Silverman v. United States*, 365 U.S. 505, 511 (1961). In *Payton*, this Court made a compact and succinct statement regarding the close relationship of the warrant clause to privacy and sanctity of the home: "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton*, 445 U.S. at 590. See also *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977); *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978). This Court has taken an adamant stand against law enforcement "exceptions" invading this "bright line", *Mincey v. Arizona*, 437 U.S. 385, 393-395 (1978); *Torres, supra.*

**B. There are no Constitutionally Compelling Reasons why an Exception to the Warrant Requirement Should be Established to Allow Warrantless Installation of a "Beeper" in an Item of Personal Property or to Allow Warrantless Monitoring of a "Beeper" Within Private Residences and Other Private Areas.**

In seeking to avoid rather than deny the validity of the premises above, the Government argues: (1) that the intrusion did not constitute a search; (2) that the fact that the search is limited in some respects places it in the *Terry v. Ohio* line of exceptions to the warrant requirement so as to require only reasonable suspicion as justification; and (3) that obtaining a warrant in cases such as this is neither feasible nor beneficial.

**1. The Invasions in Question are Significant Enough to be Considered Searches Under the Fourth Amendment.**

The Government argues that the intrusion of installation and the intrusion of monitoring were not searches for various reasons: (a) that the "beeper" was installed with the consent of one[11] in lawful possession at the time, (Pet. *Brief* at 17-20); (b) that the intrusion of a "beeper" in a container wherever it is monitored is too trival for Fourth Amendment purposes, (Pet. *Brief* at 17-21); and (c) that the possible fruits of a "beeper" search are too minimal for Fourth Amendment consideration, (Pet. *Brief* at 22).

a. *Consent.* The Tenth Circuit in *Karo* decisively rejected the premise that the Government could implant an electronic surveillance device in a container when it was in

---

[11]Government informant MUEHLENWEG

the possession of another and cause it to be delivered to an unknowing citizen, thereby insulating its installation from the warrant requirement, *Karo*, 710 F.2d at 1437-1439.[12] This proposition merely follows the position of this Court since Justice Clark declared in 1921 that an otherwise unauthorized search does not become constitutionally reasonable when its fruits are "obtained by stealth instead of by force or coercion," *Gouled v. United States*, 255 U.S. 298, 305 (1921). A contrary position would invite the Government to secrete microphones in private property and thus engage in Title III Surveillance without satisfying any of the strictures imposed by Title III and the Constitution, (18 U.S.C. 2510, et seq.). In *Katz*, the fact that the Government had achieved the intrusion by placing the microphone on the outside of the telephone booth in an area of common access rather than in the telephone booth (arguably with the consent of the telephone company) was of "no constitutional significance," *Katz*, 389 U.S. at 354.

b. *Minimal Search and Minimal Possible Fruits.* (i) *Minimal Search.* In seeking to shield its new technology from the strictures of the Fourth Amendment, the Government argues first, that it is such a minimal intrusion as to be exempt from consideration, and second, that the possible fruits of such an intrusion are too minimal to be considered a search. In regard to the issue of minimal intrusion the Respondents would argue that the intrusion is not minimal nor can it be minimal if it intrudes into a protected area or item. No case cited by the Government answers this

---

[12]In accord: see *United States v. Moore*, 562 F.2d 106, 111 (1st Cir. 1977) cert. denied, 435 U.S. 926 (1978); *United States v. Clayborne*, 584 F.2d 346, 349 at n.1; contra: *United States v. Knotts*, 662 F.2d 515, 517 n.2 (8th Cir. 1981), rev'd on other grounds, 103 S.Ct. 1081 (1983); *United States v. Bailey*, 628 F.2d 938 (6th Cir. 1980).

precise question in the Government's favor and in the Government's precedent of *Terry v. Ohio*, 392 U.S. 1 (1968), a minimal seizure is still a seizure and a minimal search is still a search, *Terry*, 392 U.S. at 16-17. Cases abound where minimal intrusions have been held to implicate the Fourth Amendment, "the lowering of the tail gate" of a pickup, *United States v. Frisbie*, 550 F.2d 335, 340 (5th Cir. 1977); "looking behind a mirror" after a consentual entry into a home, *United States v. Clarke*, 451 F.2d 584, 585 (5th Cir. 1971); "trying [a] key in a lock," *United States v. Portillo-Reyes*, 529 F.2d 844, 849 (9th Cir. 1975).

In response the Government declares that not all surveillance implicates the Fourth Amendment (which is true) and that "beeper" surveillance should be likened to "dog sniff" cases or "binocular" cases (Pet. 14, Pet. *Brief* at 30).[13] These cases are not analytically similar. First, it is the device which monitors the "beeper" that is analogous to the "sniffing dog" or the binocular-wielding policeman. The Respondents do not complain about the enhanced sensitivity of the monitor, rather the Respondents complain of the enhancement produced from *within* the confines of their container and from *within* the confines of

---

[13]The Government also makes an even more dubious analogy between "beeper" surveillance and the Government's access to the information compiled by pen registers (by which the telephone company records numbers dialed). In such cases this Court has upheld the view that a combination of implied consent with a lowered expectation of privacy through citizens using external telephone company lines rendered the Fourth Amendment inapplicable. *Smith v. Maryland*, 442 U.S. 735, 742-746 (1979). To say that because a citizen purchases articles of property in his daily life which are usually transported to the home or office by vehicles that he has implicitly consented to and must reasonably expect that the movement of such items be forever known to his Government, wherever he may move or place such articles, is ludicrous.

their residences and other private areas. To analogize the "dog sniff" cases one would have to imagine the Government installing an odor enhancement device *within* a protected container or protected area which allowed a dog some distance away to smell the odors within. To analogize the "binocular" cases one would have to hypothesize a situation where the police were able to install a floodlight *inside* a residence at night turning it on at the propitious moment to expose the activities inside to a policeman with binoculars some distance away. Neither of these two analogies would escape the strictures of *Katz* and the Fourth Amendment. The word "enhancement" is not a talisman insulating police conduct from the Fourth Amendment.[14]

(ii.) *Minimal Possible Fruits.* The Government argues that the beeper only says: "I am here," and that therefore the fact that a "beeper" only produces this minimal fruit should allow the "beeper" to avoid application of the Fourth Amendment and the warrant clause, Pet. *Brief* at 17-23. Would a constable who was near-sighted, and hard of hearing (and therefore capable of discovering little) be subject to lessened constitutional restrictions in his opening of a container or his entrance into a dwelling? Would a search of a container or dwelling limited to a single item

---

[14]Even if the "beeper" operating within is ignored, the term "enhancement" cannot be utilized to justify the overruling of *Katz* nor eliminating the expectations of privacy announced therein. A device capable of viewing or sensing through walls is no more constitutionally tolerable than the *Katz* microphone that would overhear inside a protected area from outside a protected area, *Katz*, 389 U.S. at 352-353.

or a single bit of information, whether important or unimportant to an investigation, be immune from the requirements of the Fourth Amendment?

In this case, the information provided by the beeper was vital to the continuing investigation and was not "minimal" even in that sense. In another case, the "evidence" that a beeper was monitored at a certain location at a certain time, or was monitored at a location for a certain length of time could be crucial not only to the investigation, but to a subsequent trial on the merits.

The Government also seeks to advance its minimal possible fruits premise by stating that the "beeper" signals gave no more information than visual surveillance would have given.[15] This is simply not the case. The Government admitted that: "To be sure, it is theoretically possible that a five-gallon can in which a beeper has been installed could be taken inside private premises, where it could be replaced by, or concealed within, another container or transferred to a vehicle before being taken to another location," (Pet. *Brief* at 28 n.13). However, the Government contended that "such 'shell game' maneuvers would not necessarily defeat visual surveillance," (id).

---

[15]This argument has another flaw. Aside from the fact that the "beeper" did providence more information than visual surveillance, the fact is that the Government did not in fact use visual surveillance for the greater part of the five month surveillance of the drums and relied on the "beeper" to relocate the drums time and time again when they were lost. Thus, the Government's arguments can be boiled down to the proposition that the Government might have surveilled legally, but did not, an argument which hardly passes constitutional muster, *Davis* v. *Mississippi*, 394 U.S. 721 725 n.4 (1969).

The Government hypothesizes that: "The authorities could undertake surveillance of any suspicious container that is removed from the premises and follow it to its next location, and they could follow any vehicle leaving the premises," (id). Thus, the Government claims that with an infinite number of agents, the Government could have followed all vehicles leaving the locations, then followed all vehicles leaving their destinations and so on for the entire five month period. However, it should be apparent to a careful observer that the beeper tells more than visual surveillance, especially in the circumstances just described. In this case the "beeper" told the agents that the drum was at storage locker no. 15, allowing them to follow it to the Taos house where it again said "I'm here," supplying probable cause to believe the "drum" and hence the cocaine was at the Taos house (J.A. 56-61). In the multiple "shell game" hypothesis, visual surveillance would have only told the agents that the drum was under one of a hundred, or two hundred, or of however many "shells" accumulated during the five months. Even a one in thirty chance does not equate with probable cause to search a specific location.

In summary, we have: (1) actual trespass into the container and into the homes, etc. for the purpose of gaining and relaying information;[16] (2) typical expectation of privacy in containers and in homes, etc.; and (3) significant information obtainable and actually obtained in this case.

**2. The Circumstances of "Beeper" Surveillance do not Support the Creating of a New Exception to the Warrant Requirement.**

---

[16]The Government admitted that: "... perhaps the beeper's continued presence after transfer of the container to a new owner constituted a technical trespass," (Pet. *Brief*, at 20); and that: "... the beeper may have been 'trespassing' on Respondent's property (Pet. *Brief* at 27).

The Government next argues that if its "beeper" intrusion is a search under the Fourth Amendment, then this Court should create a new exception to the warrant requirement, (Pet. *Brief* at 31-38). The Government argues that this exception should be created because: (1) combatting drug traffic is a substantial consideration, (Pet. *Brief* at 35-36); (2) the search was limited, (Pet. *Brief* at 20-23); (3) police efficiency would be increased, (Pet. *Brief* at 31); and obtaining a warrant is not feasible, (Pet. *Brief* at 43-45).

a. *Needs of a Law Enforcement.* The Government contends that its efforts at law enforcement would be aided by exact knowledge of the location and movement of its citizen's chattels. (No doubt!) Toward this end, the Government cites *United States v. Martinez-Fuerte,* 428 U.S. 543, 555 (1976), and similar cases, but to little avail. In *Martinez-Fuerte* this Court found the interest of combatting alien and drug smuggling *plus* the proximity of the international boundary to be compelling enough to justify a brief stop and questioning of the occupants of a vehicle, hardly the situation of our case. *Martinez-Fuerte,* 428 U.S. 556-557. In *United States v. Mendenhall,* 446 U.S. 544 (1980), this Court took notice of the drug problem and authorized a *brief stop* of a narcotics suspect under exigent circumstances at an international airport. *Mendenhall,* 446 U.S. at 561-563. However, what would be the outcome in these situations if the public interest could co-exist with the Fourth Amendment interest without injury to either? In our case, warrants, orders to seal, extensions, and the like could and were routinely and easily obtained (RIV Gov. Ex. 5, etc.) which was not the case in the above case. Additionally, the needs of law enforcement in regard to combatting drug traffic must be taken into proper perspective. Confronting an even more serious situation of law

enforcement this Court finally declared that: "Except for the fact that the offense under investigation was a homicide, there was no exigent circumstances in this case . . . • • • [Also] there is no suggestion that a search warrant could not easily and conveniently have been obtained [therefore we] decline to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search." *Mincey*, 437 U.S. at 394. And this premise brings us full circle with *Terry; Mendenhall; Martinez-Fuerte;* see also *Pennsylvania v. Mimms*, 434 U.S. 106 (1969); and *Adams v. Williams*, 407 U.S. 143 (1972), etc. All of these cases involve a situation which presents exigent circumstances and/or insurmountable compliance problems (with the warrant equirement).[17]

b. *Limited Search.* The Government argues that because of "the limited intrusion, if any, on privacy interests resulting from beeper surveillance, use of a beeper to locate a source of illegal drugs is fully justified on the basis of reasonable suspicion that criminal activity is afoot." (Pet. *Brief* at 31-38), thereby seeking to bring the beeper into the *Terry v. Ohio* situation where a compelling public need (which we have already discussed) overcomes a limited intrusion. The Government argues that the intrusion

---

[17]In an opinion by Burger, Ch. J., joined in by White, Powell, Rehnquist and Stevens, J.J., this Court reminded the Government that: "Although we have recognized exceptions to the warrant requirement *when specific circumstances render compliance impracticable*, we have not dispensed with the fundamental Fourth Amendment prohibition against unreasonable searches and seizures simply because of a generalized urgency of law enforcement." (Emphasis supplied). *Torres*, 440 U.S. at 473-474. *See also* concurring opinion of Brennan, J., joined by Stewart, Marshall, and Blackmun, J.J., 442 U.S. at 476.

is "slight" because the electronic signalling device only "broadcasts 'here I am'" (Pet. *Brief* at 36-37). What the Government fails to acknowledge is that the *Terry* line of cases that it cites requires that *the intrusion be limited in all respects*, extent of intrusion, duration, and locality, see *Terry, supra; Martinez-Fuerte, supra; Mendenhall, supra.* When we examine any of these cases and, for example, alter the duration factor, the result changes. *Mendenhall* becomes *United States v. Place*, — U.S. —, 103 S.Ct. —, 77 L.Ed.2d 110 (1983) where the Court noted: . . . the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is unreasonable, 77 L.Ed 2d 122, citing *Dunaway v. New York*, 422 U.S. 200, 99 S.Ct. 2248, 60 L.Ed2d 824 (1979). The same result happens even more forcefully in *Terry* and in *Martinez-Fuerte*. What result when officer McFadden pats and frisks John Terry for five months? What result when Amado Martinez-Fuerte is questioned for five months? Since this Court's opinions in *Chadwick* and *Mincey* applied the Fourth Amendment's warrant requirements to a person's things, containers and home, and since *Place* places a duration requirement on reasonable suspicion intrusions upon things and containers, it would follow that *Terry, Martinez-Fuerte*, and *Mendenhall* lead the Government back to the warrant requirements of the Fourth Amendment.

c. *Police Efficiency.* Police efficiencey has never justified exceptions to the Fourth Amendment. Indeed, this Court has written: "The investigation of crime would always be simplified if warrants were unnecessary [but] the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the

name of maximum simplicity in enforcement of the criminal law." *Mincey*, 437 U.S. 393.

d. *Warrant not Feasible.* The last reason offered by the Government to support a new exception to the Fourth Amendment is that obtaining a warrant would not be feasible. Even aside from the fact that a warrant authorizing the installation and monitoring of the beeper was actually obtained in our case without difficulty, the circumstances of this case and other beeper cases illustrate that because there is usually no exigent circumstances[18] a warrant could be leisurely obtained. Indeed, in this case the speed of normal business channels was too slow for the federal agents who called the chemical company "to expedite the shipment," (J.A. 71). Such circumstances can hardly be called "exigent." Likewise, the general form of the warrant actually used in our case (if one ignores the falsehoods), is a practical and appropriate model: (1) it names the known targets; (2) it states the violations of law believed to be involved; (3) it summarizes anticipated installation and monitoring; and (4) limits monitoring for a set period of time RI 23. In this manner it follows in large part the considerations upon which the warrant clause was created, and follows in a general, non-technical sense the major limitations placed on Title III Surveillance, 18 U.S.C. 2510, et seq. Save for Government's decision to make virtually the entire factual statement false and misleading, (J.A. 155-158), it would have been a good warrant. If the Government can avoid lying in other "beeper" cases, the Government should be able to easily obtain warrants.

**3. Obtaining a Warrant is not Only Feasible but Beneficial in "Beeper" Cases.**

---

[18] If there were exigent circumstances these circumstances would probably obviate the need for a warrant in *that* case. However, there were no exigent circumstances in this case.

Obtaining a warrant in this case is not only feasible, but beneficial in many ways. The first is that the warrant could largely achieve the purposes of the warrant clause as previously outlined. However, even aside from these salutory aspects of requiring a warrant, there is an area of grave concern to this Counsel that "beeper" surveillance which is not subject to judicial limitation could transform this country into a "surveillance state," in other words into *1984*. Justice Rehnquist in *Knotts*, 75 L.Ed.2d at 63 commented that this situation would be handled when it appeared. Similarly, the Government attempted to placate the fears of the suspicious by stating that "post-search judicial review" would be enough to monitor such activity. What is apparently missed by this Court and what is apparently concealed by the Government is the fact that the public and the Court will have no knowledge of the actual extent of use of these devices. The only information this Court could even collect would be those cases where a "beeper" was used, a criminal prosecution was initiated, and the Government disclosed the use of a beeper. Without a warrant requirement, Federal, state, and local agents could use hundreds of thousands of beepers and only disclose a few instances as in the comparatively rare cases listed above. In some areas where criminal prosecutions are rare such as in domestic surveillance, there would never be a ripple on the pond as the Government compiled its information on the comings, goings, and meetings of its citizens. The only persons whose rights to privacy could be vindicated would be a small portion of the guilty and none of the innocent. Surely, if there are areas from which we may not strip the protection of the Warrant Clause, this is one.

**4. Unfettered Installation and Monitoring of Beepers and Other Surveillance Devices Poses a Significant Danger to the Republic and its Citizens.**

In Counsel's view, granting an exception (or more correctly an exemption) from the requirements of the Fourth Amendment would result in two evils: (1) allowing an unfettered use of beeper surveillance which would permeate our national existence; and (2) allow intrusions by other technological devices on similar grounds.

a. *Unactivated "Beepers".* Personal privacy is effected by the very presence of an unactivated beeper, *Karo,* 710 F.2d at 1438-1439. The Government claims that an unactivated "beeper" harms no one, and analogizes it to a crowbar which has the capability of breaking down a door, but for the present is lying innert, (Pet. *Brief* at 21). This is not a proper analogy since a crowbar cannot instantly perform function without aid and at the flip of a switch as is the case with "beepers." The possibility that a person's effects, clothing, containers, and movements could be instantly monitored would be chilling to many of the rights guaranteed by the Constitution. The fact that Winston Smith's television was *capable* of monitoring him was enough to keep him in perpetual apprehension, although he never knew whether it was being used in this fashion at any given moment, Orwell *1984* (1949).[19] And

---

[19]There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system . . . was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they wanted to. You had to live — did live, from habit that became instinct — in the assumption that every sound you made was overhead, and, except in darkness, every movement scrutinized. 1984 at p. 6.

if the populace learned through this case or another that such installations could be authorized by mere police discretion and activated under the same authority, their apprehensions would be the same as that of the hapless Smith.

b. *Activated "Beepers".* Aside from the chilling effects of mere installation, actual monitoring would completely invade the privacy of our citizens. Under the technology of today, the "beepers" could probably trace the movements of any middle size object and whoever was in control of such object. Under the technology of tomorrow, smaller "beepers" or possibly even electronic imprints could be placed on an object (whatever the size) or upon persons and could be monitored by more sensitive, computerized monitors which could handle hundreds or thousands of surveillances simultaneously. Anyone who would declare that such a development is impossible or even improbable is not listening to the ever quickening pulse of technology. Having one's currency, securities, papers, valuables and constantly under surveillance would diminish if not destroy the values which the Bill of Rights seeks to protect.

c. *New Technological Devices.* If the Government is allowed an exception from the Fourth Amendment in this case for the reasons given, would not the Government be able to use a host of other devices on the same rationales? Aside from devices which have not yet been invented, this Counsel sees a host of devices including thermometers, electro-magnetic sensors, electrical meters, "smelling" devices, litmus papers, and whatnot which could be thrust into containers and homes at will on the grounds that they

are but limited intrusions conveying limitated information toward a legitimate purpose (criminal investigation).

Some members of this Court may feel that counsel is raising alarms not necessary to nor necessitated by the cause at hand. In reply, Counsel must point out that the investigative practice sought to be authorized here for "drug manufacturing" schemes is not only pernicious in its allegedly limited uses, but is capable of virtually infinite expansion in scope and application. Should we grant the exception to the warrant requirement urged by the Government there is no logical or legal reasoning which can be utilized to effectively limit its application and scope. The rationales advanced by the Government in support of this "beeper" exception not only fail to limit the exception requested, but act as burgeoning engines for more and wider exceptions.

For example, the Government speaks of the "substantial, if not compelling" interest in combatting drug traffic as a supporting argument. However, if the need to combat drug traffic is allowed to void or minimize the warrant and probable cause requirements of the Fourth Amendment, how can this Court logically or legally bar the way to similar investigations into alien-smuggling, violations, organized crime, tax evasions, customs violations, murders, violent crime, potentially violent subversive organizations, or any area of law enforcement focus. Thus, what appears to be a limitation is merely the tip of the iceberg which must be accepted by this Court if an exception is created.

The enhancement of police investigation efficiency is still another ground offered to support establishing a

"beeper" exception, but this ground is in itself a rationale for unlimited scope and application. For instance, if one opens the door of the Fourth Amendment to the call of police efficiency, how can one successfully complain of later generations of devices on the grounds that they do more, or are more efficient. It would seem that if efficiency is the key that opens the door, that greater efficiency and hence greater capability should open the door even wider.

Also utilized by the Government is the argument that obtaining a warrant is not feasible. This basis is also a source of unlimited encroachment on the Fourth Amendment. In our case we find the combination of: (1) several weeks notice plus (2) an existing model for a warrant plus (3) circumstances where a warrant conforming to the model was actually obtained without serious difficulty. If this set of circumstances presents a situation where obtaining a warrant was not feasible, then when would a warrant be feasible? Across the board, such an approach would emasculate if not eliminate the warrant requirement altogether.

**C. The Decision of This Court in Knotts is Consistent With the Application of the Warrant Requirement to "Beeper" Installation Into Private Property and to "Beeper" Monitoring Within Residences or Other Private Areas.**

The decision on the Tenth Circuit in *Karo* barring warrantless installation and monitoring is consistent with this Court's decision in *Knotts* and with the other precedents of this Court.

1. *Installation of the "Beeper".* This Court in *Knotts* specifically observed that the legitimacy of the installation was not at issue in the case, 75 L.Ed.2d at 60 n. *.[20] There is apparent conflict between the circuits, with the First and Tenth Circuits applying the warrant requirement and the Fifth, Sixth, Eighth, and Ninth Circuits failing to apply the warrant requirement.[21] However, the Tenth Circuit's opinion did no more than to apply this Court's opinions in *Katz* and in *Chadwick* to the intrusion of the beeper into a container which was entirely lawful in nature, *Katz*, 389 U.S. 347; *Chadwick*, 43 U.S. 1.

The Government argues against a decision requiring warrants for installation on the grounds that such a decision would minimize the applicability of *Knotts*. Neither the Respondents nor the Constitution should suffer because a case presenting a narrower issue preceded a case of wider impact. It is not judicial economy to overrule *Katz* and *Chadwick* simply to enhance the applicability of a recent case of this Court.

2. *Monitoring the "Beeper" Within Residences, etcetera.* The Government urges this is in spite of the fact that Justice Rehnquist specifically observed in *Knotts*

---

[20]Three members of this Court voiced concern about the legality of the warrantless installations, *Knotts*, 75 L.Ed 2d at 65, 66.

[21]See *Karo, supra; Moore, supra; Clayborne, supra; United States v. Brock*, 667 F.2d 1311, 1319 n.4 (9th Cir. 1982), cert. denied, No. 81-6922 (Mar. 7, 1983); *United States v. Bailey*, 628 F.2d 938, 943 (6th Cir. 1980); *United States v. Bernard*, 625 F.2d 854, 860 (9th Cir. 1980); *United States v. Lewis*, 621 F.2d 1382, 1388 (5th Cir. 1980); cert. denied, 450 U.S. 935 (1981); *United States v. Bruneau*, 594 F.2d 1190, 1194 (8th Cir.), cert. denied, 444 U.S. 847 (1979).

that: "Respondent Knotts, as the owner of the cabin and surrounding premises to which Petschen drove, undoubtedly had the traditional expectation of privacy within a dwelling place insofar as the cabin was concerned," *Knotts*, 75 L.Ed.2d at 62; and quoted *Johnson v. United States*, 33 U.S. 10, 13-14, 68 S.Ct. 367, 92 L.Ed. 436 (1948) for the proposition that:

> Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also of grave concern, not only to the individual, but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search, is as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent. (Citations omitted). *Knotts*, 75 L.Ed.2d at 62.

With the Ninth and perhaps the Fifth in minority,[22] the majority of circuits have uniformly drawn a "bright line" in front of the residence and other private areas, as against "beeper" surveillance which intrudes upon the area, see *Karo, United States v. Moore*, 562 F.2d 106 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978), *United States v. Bailey*, 628 F.2d 938, 944 (6th Cir. 1980), *United States v. Cassity*, 720 F.2d 451 (6th Cir. 1983), Slip Opinion Nos. 81-1565 et seq. (October 31, 1983). Both the Tenth Cir-

---

[22]See *United States v. Brock*, 667 F.2d 1311 (9th Cir. 1982) *cert. denied* No. 81-6922 (Mar. 7, 1983); however, in *United States v. Michaels*, 645 F.2d 252 (5th Cir. 1981), *cert. denied* 454 U.S. 950, and *United States v. Butts*, 710 F.2d 1139 (5th Cir. 1983) *reh. granted*, does not deal with this specific issue of monitoring of inside residences or other private areas. Indeed none of these cases would support a five month "dragnet" unlimited in all respects.

cuit in *Karo* and the Sixth Circuit in *Cassity* specifically utilized this Court's strong words in *Knotts* to reach their result, *Karo*, 710 F.2d at 1439-1450; *Cassity* (Lexis Opinion), at pp. 4-5. The *Karo* Court would permit law enforcement to intrude into the threshold with "beepers", but only under the aegis of the Magistrate's neutral judgment.

## II. SHOULD THE FOURTH AMENDMENT NOT COMPEL SUPPRESSION IN THIS CAUSE, THE EVIDENCE SHOULD STILL BE SUPPRESSED IN ORDER TO PROTECT THE INTEGRITY OF THE COURT THROUGH USE OF ITS SUPERVISORY POWERS.

As this Court will recall, the Respondents in this cause have repeatedly sought to justify suppression of the evidence on the grounds that if the Fourth Amendment is deemed inapplicable then the evidence should be suppressed under the Court's supervisory powers,[23] *Brief for Appellees* (Horton and Harley) at pp. 35-39; Resp. *Brief in Opposition* (Horton and Harley) at pp. 19-20. Looking at the facts, the exercise of this Court's supervisory powers is not only authorized, but required.

The Respondents' version of the facts is that an Assistant United States Attorney and a DEA Agent conducted a false and misleading warrant to which the DEA Agent swore in the Assistant United States Attorney's presence, (J.A. 126-127). The Government's version is even more horrible in this Counsel's eyes. According to

---

[23]Respondents continued to raise this issue here because: "because the prevailing party may defend a judgment on any ground which the law and the record permit that would not expand." *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977).

the Government, (Pet. *Brief* at p. 4 n.3), the DEA and the U.S. Attorney's office first conducted this false and misleading affidavit to protect a confidential information; then confidentially revealed to a U.S. District Judge that a portion of the affidavit was false and "that information was omitted," (Pet. *Brief* at 4 n.3); then swore to the false facts before the judge; and then secured the signature of the District Judge on the warrant which had been falsified, (J.A. 127).

We have the complicity of a Federal Agent, a Federal Attorney, and (if you can believe the Government) a Federal Judge in intentionally producing a warrant application that was patently false and misleading.[24] It was only because Defense Counsel chanced upon information which was not public knowledge, to the effect that MUEHLENWEG was an informant that Counsel and the Court could deal with the real facts. As it is, no sanctions have been leveled against the Government's agent or its attorney, *Brief for Appellees*, pp. 35-39, but the Government is still trying to admit the fruits of its lie.

The power of the Federal Courts include the power "to supervise 'the administration of criminal justice' among the parties before the bar," *United States v. Payner*, 447 U.S. 727, 735 n.7 (1980). Such power includes the suppression or exclusion of evidence gained by "willful disobedience of the law," *McNabb v. United States*, 318 U.S. 332, 345 (1942). This power has been recently utilized in a similar Fourth Amendment setting. In that case, the Seventh Circuit declared:

---

[24]District Judge Bratton deemed it's as "phoney as a three-dollar bill," (J.A. 156).

> Unless officers of the law know that the consequences of deliberate misrepresentations will be the suppression of the evidence, "lawless or reckless misconduct" will not be encouraged, but invited. * * * Courts must act in their own self-defense against brazen violations of their procedures. We must draw the line at misconduct occurring within our own house. *United States v. Cortina*, 630 F.2d 1207 (7th Cir. 1980).

These principles are clearly applicable to our case where like *Cortina*, the crime was committed in the Court's own chambers. Any result other than suppression would give the Government the benefit of its lie and leave them laughing at both Counsel and the Court. How can we in effect reward this intolerable conduct by granting the Government a new exception to the warrant requirement. What effect would that result have on the Government's respect for the Court? What effect would that result have on the Government's respect for Constitution if we reduce it to part of the loot of their misdeeds.

## CONCLUSION AND PRAYER

If the United States Constitution is seen as extolling the virtues of ordered liberty, then the Bill of Rights must be considered as supporting the view that that Order will tend to diminish liberty more and more as the years pass and thus order should itself be restrained in some manner.[25] The central amendments in the Bill of Rights attempt to

[25]See comments of Mr. James Madison, Gales, *Debates and Proceedings in the Congress of the United States*, Vol. 1 (Washington: Gales and Seaton 1834), at Col. 448-449.

protect a core of rights thought to be crucial to the liberty of the individual. Many of these amendments involve or overlap the issue of individual privacy. For example, the First Amendment limits Governmental infringement of "freedom to associate and privacy in one's associations," *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 462 (1948); the Third Amendment protects the privacy of the home against Governmental peacetime quartering of soldiers; the Fourth Amendment protects those spheres in which a person has a "reasonable expectation of privacy," whether in public or in private, *Katz v. United States*, 389 U.S. 347, 350-353 (1967); and the *Katz* Court also noted that "the Fifth Amendment too, 'reflects the Constitution's concern for [the right of each individual] to a private sphere where he may lead a private life,'" citing *Tehan v. Shott*, 382 U.S. 406, 416 (1966), *Katz*, 389 U.S. at 350, n.5. One of the more crucial elements of this bright line is the Fourth Amendment which "protects individual privacy against certain kinds of Governmental intrusion, but its protections go further . . . ," *Katz*, 389 U.S. at 350. An even wider "bright light" is drawn around those privacy interests enjoyed in a citizen's home be it castle or cottage.

Our forefathers did not intend the Fourth Amendment as a law enforcement facilitation act of 1790-91. Rather, the Fourth Amendment was meant to do exactly what its critics complain that it does: impede and hinder law enforcement. Of course it was not intended to do so for the mere sake of impeding and hindering the forces of order, but rather for the purpose of protecting that private sphere upon which Government may not transgress at will. In considering these deliberate constraints placed upon law enforcement, we must be careful to remember that our

founding fathers were intimately familiar with the onerous burden that these brief written passages would place on those charged with maintaining the public order and safety. They knew better than we the dangers posed by granting citizens those rights which would allow many of their private activities to proceed not only unchecked but unmonitored.

No Justice sitting on this Court has experienced anything similar to the crucible of momentous events in which our father's ideas of liberty and order were forged. We have never walked in their footsteps, yet we are charged with the solemn and sworn duty to uphold the very document which was so conceived. It is not an easy task. We can only attempt to remove ourselves from our comparatively complacent and pedestrian existence and to approximate the spirit which gave birth to the Bill of Rights, and specifically the Fourth Amendment. Looking at the Bill of Rights in this light, one is amazed that these former insurrectionists would endanger their own handiwork by deliberately making our infant Government more vulnerable than the great power that they had just overthrown. Counsel can but stand in awe of such courage.

We who have received their legacy find ourselves in a nation of unequalled power and plenty, but yet we may have been cheated out of a portion of this inheritance. Apparently, we do not have that courage. Though our nation is a giant among nations, secure in might and wealth, it appears that we have grown fainthearted and timorous in maturity. The same Government which in its infancy shouldered the burden of the Fourth Amendment and walked steadfastly forward now stands before this Court with its hat in its hand, asking to be relieved of a portion

of that burden. This Government pleads that it is weak and vulnerable and that the enemies of order wax strong. This same Government finds the threat posed by the problem of drug traffic to be "substantial, if not compelling" (Pet. *Brief* at 35) in the context of the Fourth Amendment. But, every generation faces its own crises, threats, and challenges. Looking from the birth of our nation forward, we see objections to Federal taxes on whiskey developing into actual rebellion; further war with England with our very capitol in flames; civil war which produced conflict and desolation of an unequalled magnitude; a world war; a crusade against alcohol in which law enforcement actually had to admit defeat; a world-wide depression; another world war; the threat of nuclear holocaust; the problem of drug use and drug traffic; the problem of massive flow of illegal aliens; etcetera; to name but a few of the threats that we have faced. If we accept the fact that every one of these problems or threats is a "substantial, if not compelling" basis for further reduction in the scope of the Fourth Amendment, then we have accepted the piecemeal repeal of the Fourth Amendment and the only question remaining is the actual date of its final demise.

Hand in hand with this apprehension felt toward modern problems we also find a growing array of modern devices which in fulfilling their promise of aiding law enforcement and ameliorating our problems threaten to erase the private sanctuaries of home and offices by technological fiat. The first of these was the now-venerable wiretap, a challenge that was successfully met in *Berger v. New York*, 388 U.S. 41 (1967) and in another form in *Katz*. One of the more recent of these devices is the "beeper", but it is merely one of a host of recent inventions. These new devices have been a boon to those who find the Fourth

Amendment anachronistic if not dangerous, but yet lack the temerity to suggest outright repeal or avoidance of the amendment. These individuals see clearly and correctly that a mere disinclination against applying the Fourth Amendment to the inroads created almost daily by science will achieve the same result in the end. The embarrassing rejection of the ideals of our founding fathers can be thus viewed as a much more palatable acquiescense to "progress." Counsel finds this process just as repugnant to the oath which we all take to uphold the Constitution as would be an outright refusal to enforce the Fourth Amendment. Since we have long since accepted the notion that other portions of the Constitution should be expanded and interpreted so that they may encompass modern situations, failure to do so in the case of the Fourth Amendment will amount to intentional repeal.

We enjoy liberty largely because of the industry and sacrifice of others. And it is because of this that we are the most constricted when writing or ruling on the law set forth by the Constitution and the Bill of Rights. Ours must always be a guided hand. This must be so that we may successfully meet the perils and problems of the moment without succumbing to the fate of the spendthrift and losing the inheritance we have received. In this regard, the decision of the Tenth Circuit in *Karo* is a conservative application of the time-honored warrant requirements of the Fourth Amendment to the technology of today. *Karo,* like *Katz* before it, protects the sphere of privacy guaranteed by the Bill of Rights through the balance created by a judicial check while still allowing Government to enlist these devices in its criminal investigations. This balanced approach is far more consistent with

the history of the Fourth Amendment just examined than the position taken by the Government which strives to utilize these devices which implicate our very liberty and privacy in a manner limited only by administrative discretion and whim, an approach which would have been anathema to those who promulgated the Bill of Rights.

However much lip service we give to the ideals and spirit of the Fourth Amendment, it only becomes real if it is actually enforced with concrete intentions and means,[26] and this enforcement must be against all threats, whether ancient intrusions or the novel forms created by the inexorable progress of technology. If we were to do otherwise, the remainder of the Fourth Amendment would be like the remnants of a dam breached by flood, more of a memorial to what once was then a factor in our present or future. The Respondents would ask this Court to take firm hold of this inheritance so dearly bought by the labors and sacrifices of past generations and to affirm the decisions of the Trial Court and the Court of Appeals below.

Respectfully submitted,

Joseph (Sib) Abraham, Jr.
Charles Louis Roberts
*Attorneys for Respondent*
William Robertson Harley
P.O. Box D
El Paso, Texas 79951-0004
(915) 544-7860

---

[26]Respondents would point to unenforced guarantees of privacy found in various constitutions throughout the world. For example see *U.S.S.R. Constitution*, Article 55, "Citizens of the U.S.S.R. are guaranteed inviolability of the home," etc.

Of Counsel:

MELVIN POTTER STRAUS, PH.D.

By: WILLIAM MARCHIONDO
MICHAEL VIGIL
CHARLES LOUIS ROBERTS
*Attorneys for Respondent*
RICHARD MILES HORTON
P.O. Box 568
Albuquerque, New Mexico 87103
(505) 247-0751

(THIS PAGE INTENTIONALLY LEFT BLANK)

Office - Supreme Court, U.S.
FILED
APR 9 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-850

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

---

UNITED STATES OF AMERICA,

*Petitioner,*

v.

JAMES CONNORS KARO, *et al.*,

---

**On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

---

## BRIEF FOR RESPONDENT RHODES

---

ROGER BARGAS
BARGAS and ZVOLANEK
601 Tijeras N.W., Suite 200
Albuquerque, New Mexico 87102
(505) 247-0717

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

## TABLE OF CONTENTS


| | Page |
|---|---|
| STATEMENT | 1 |
| SUMMARY OF ARGUMENT | 3 |
| I. The Warrantless Installation Of The Beeper Violated Rhodes' Fourth Amendment Rights When He Took Possession Of The Beeper-Laden Container | 3 |
| II. The Warrantless Monitoring Of The Beeper In The Vicinity Of Rhodes' Residence And During His Stay At The Taos Residence Violates The Fourth Amendment | 4 |
| CONCLUSION | 5 |

## TABLE OF AUTHORITIES

CASES: Page

*Alderman* v. *United States*, 394 U.S. 165, at 179 n.11 (1969) ..... 5

*Rawlings* v. *Kentucky*, 448 U.S. 98, at 105 (1980) .... 4

*United States* v. *Knotts*, No. 81-1802 (March 2, 1983) . 5, 6

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

---

No. 83-850

---

UNITED STATES OF AMERICA,

*Petitioner,*

v.

JAMES CONNORS KARO, *et al.*,

---

**On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

---

## BRIEF FOR RESPONDENT RHODES

---

### STATEMENT

The court of appeals held that respondent Rhodes failed to establish that the beeper was monitored in any place in which he had a legitimate expectation of privacy, and that he did not establish any possessory interest in the ether violated by the installation of the beeper. Pet. App. 14a-15a. Accordingly, the court reversed the district court's suppression of evidence as to Rhodes. Rhodes filed a cross-petition for writ of certiorari with this Court which was docketed on December 27, 1983 as No. 83-5982 claiming that the court of appeals erred by reversing the trial court's determination that he had standing to raise a Fourth Amendment claim, and erred further by failing to address the issue of supervisory control raised below.

Rhodes' apparent involvement in this case starts on February 6, 1981, when DEA agents, monitoring a closed circuit video camera focused on the door of the second self-storage facility in Albuquerque, observed Rhodes and an unidentified woman remove the cans of ether and load them into a pickup truck. Using both visual and beeper surveillance, agents followed the truck to Rhodes' residence. The agents were unable to determine if the beeper was inside Rhodes' residence. The record is not clear, but it seems that the agents concluded that the beeper never entered the Rhodes residence because they observed Rhodes bring boxes and other items, but no ether cans, from inside the house and load them into another vehicle. J.A. 56-57.[1] The record does not establish how long the pickup truck was parked at the residence, nor does it establish the amount of time that passed during the break in the visual surveillance subsequent to Rhodes' departure from the storage facility.

Later that day, DEA agents, again using both visual and beeper surveillance, followed Rhodes as he drove the pickup truck containing the ether cans to the Taos residence. Rhodes spent the night in the Taos residence and left the following day. H. Tr. 315. Using the beeper locater, the government agents were able to positively

---

[1] The affidavit for the search of the Taos residence mistakenly identifies respondent Horton as the person who took the beeper-laden ether can from the second storage locker when it fact it was respondent Rhodes. The agents later acknowledged this error and testified that it was Rhodes who loaded the pickup truck and drove it to his residence and later to Taos. J.A. 90-94, 96-97, 110-111.

The government's brief misleads the Court by indicating that the agents had no difficulty observing Rhodes remove the cans and load them into the pickup. Pet. Brief 27-28 f.n. 12.

This continuing confusion on the part of the government may explain the court of appeals' error in holding that Rhodes never had a possessory interest in the ether can.

pinpoint the beeper signal as emanating from the Taos residence the evening of February 6th and again on February 7th. J.A. 57-58. The agents observed that windows and doors in the house were open on February 7th, even-though it was a cold and windy day, and surmised that the ether was being opened and used and not simply stored on that date. J.A. 58-61.

## SUMMARY OF ARGUMENT

Respondent Rhodes, through his attorney, has consulted with counsel for all co-respondents, and has reviewed the briefs that will be submitted on their behalf. In the interest of judicial economy, and in order to avoid duplicitous and unnecessary pleadings, respondent Rhodes hereby adopts the briefs of all co-respondents and incorporates the arguments and authorities by reference. This brief is submitted solely to focus on facts and circumstances unique to Rhodes and is therefore only supplemental.

Rhodes submits that his reasonable expectation of privacy was violated on at least two occasions: 1) When he took possession of the beeper-laden ether can; and, 2) When the beeper was monitored in the vicinity of his residence and when the agents pinponited the beeper signal emanating from the Taos residence during his overnight stay on February 6th and 7th.

### I. The Warrantless Installation Of The Beeper Violated Rhodes' Fourth Amendment Rights When He Took Possession Of The Beeper-Laden Container.

The court of appeals held that Karo had a right to own and possess the ether can without the illegally installed beeper and that the evidence seized at the Taos residence was tainted by the illegal installation. This holding, if consistently applied, should apply with equal force to respondent Rhodes.

It is uncontradicted that Rhodes took possession of the ether can. He picked it up from a locked self-storage facility to which he had a key. J.A. 153. He drove the pickup truck containing the beeper-laden can to his residence and then to the house in Taos.

The only apparent distinction between Karo and Rhodes, regarding the installation issue, is that Karo had both a possessory and proprietary interest in the ether while Rhodes only had a possessory interest. This Court has rejected the application of arcane distinctions, evolved in property law, to Fourth Amendment issues. *Rawlings* v. *Kentucky*, 448 U.S. 98, at 105 (1980). Rhodes was a bailee of the ether can with full control over its movement. There is no constitutionally significant difference between a lawful bailee of an object and the lawful owner. Both have a reasonable expectation that containers coming into their possession have not been opened and bugged by the government.

**II. The Warrantless Monitoring Of The Beeper In The Vicinity Of Rhodes' Residence And During His Stay At The Taos Residence Violates The Fourth Amendment.**

The government's most significant piece of evidence against Rhodes was developed by monitoring the beeper within the Taos residence following his delivery of the ether cans. After Rhodes drove the pickup truck containing the cans to Taos, the government agents were able to pinpoint the beeper signal as emanating from within the residence. J.A. 57-58. During this time the agents observed that the windows and doors of the residence were open despite the inclement weather. This observation, coupled with the information that the can was within the residence, led the agents to the conclusion that the ether was being opened and used and not simply stored. J.A.

61. The monitoring and observation occurred at a time when Rhodes was an overnight guest within the house. H. Tr. 315.

The monitoring of the beeper while Rhodes was an overnight guest in the Taos residence puts him in a much different position than the defendants in *United States* v. *Knotts*, No. 81-1802 (March 2, 1983). In *Knotts*, there was nothing in the record to indicate that the beeper signal was monitored after the drum ended its journey to Knotts' cabin.

This Court extended the constitutional expectation of privacy within a residence to invitees as well as home owners. See *Alderman* v. *United States*, 394 U.S. 165, at 179 n.11 (1969). Realistically, this Court recognized that most of society expects that when they are guests in someone's home they will be free of unwarranted intrusions.

Prior to driving to the Taos residence, Rhodes drove the pickup truck with the beeper-laden container to his residence. The agents were unable to determine whether the beeper actually went into the four walls of his residence or not. The agents presumed it did not because once they regained visual surveillance of the truck and residence they observed Rhodes and a woman removing objects, but no ether cans, from the house. J.A. 57. This conclusion fails to acknowledge that the record is silent on how much time passed after the agent lost visual contact with the truck and picked it up again at Rhodes' residence. It is left to speculation whether the time span was so short that it was impossible or improbable that Rhodes and his companion prudently moved the ether can into his residence and out again before the agents regained visual surveillance.

The fact that the beeper was monitored within a house where Rhodes was staying as an invitee, and may have been monitored in his own residence, places him in a much different position that Petschen, the person who merely transported the chloroform in the *Knotts* case. Rhodes' constitutionally recognized expectation of privacy was violated by the warrantless beeper monitoring and the trial court correctly suppressed the evidence as to him.

## CONCLUSION

The judgment of the court of appeals should be affirmed, and modified to include respondent Rhodes in its affirmance of the trial court's suppression order.

Respectfully submitted,

ROGER BARGAS
BARGAS and ZVOLANEK
601 Tijeras N.W., Suite 200
Albuquerque, New Mexico 87102
(505) 247-0717
Attorney for Respondent Rhodes

Office - Supreme Court, U.S
FILED
APR 13 1984
ALEXANDER L. STEVAS
CLERK

No. 83-850

# In the Supreme Court of the United States

OCTOBER TERM, 1983

---

UNITED STATES OF AMERICA, PETITIONER

*v.*

JAMES CONNORS KARO, ET AL.

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

---

## REPLY BRIEF FOR THE UNITED STATES

---

REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## TABLE OF AUTHORITIES


Cases: Page

*Adams* v. *Williams*, 407 U.S. 143 ..... 12
*Arkansas* v. *Sanders*, 442 U.S. 753 ..... 3
*Franks* v. *Delaware*, 438 U.S. 154 ..... 17
*Hester* v. *United States*, 265 U.S. 57 ..... 7
*Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983) ..... 3
*Katz* v. *United States*, 389 U.S. 347 ..... 7
*Rakas* v. *Illinois*, 439 U.S. 128 ..... 5
*Michigan* v. *Thomas*, 458 U.S. 259 ..... 14
*Oyler* v. *Boles*, 368 U.S. 448 ..... 15
*South Dakota* v. *Opperman*, 428 U.S. 364 ..... 12
*Terry* v. *Ohio*, 392 U.S. 1 ..... 11, 12
*United States* v. *Broward*, 594 F.2d 345, cert. denied, 442 U.S. 941 ..... 18, 19
*United States* v. *Chadwick*, 433 U.S. 1 ..... 2
*United States* v. *Cortina*, 630 F.2d 1207 ..... 18
*United States* v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984) ..... 2-3, 6, 7, 8
*United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983) ..... 5, 7, 8, 9, 14, 15
*United States* v. *Miller*, 425 U.S. 435 ..... 16
*United States* v. *Payner*, 447 U.S. 727 ..... 17, 18
*United States* v. *Place*, No. 81-1617 (June 20, 1983) ..... 6, 7
*United States* v. *Salvucci*, 448 U.S. 83 ..... 4
*Zurcher* v. *Stanford Daily*, 436 U.S. 547 ..... 16

Constitution and statutes:

U.S. Const.:
Amend. I ..... 15
Amend. IV ..... *passim*
Amend. V ..... 15
Amend. XIV ..... 15

Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 *et seq.* ..... 16
Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, Tit. XI, 92 Stat. 3697 *et seq.* ..... 16

Miscellaneous:

H.R. Rep. 95-1383, 95th Cong., 2d Sess. (1978) ..... 16
S. Rep. 96-874, 96th Cong., 2d Sess. (1980) ..... 16

# In the Supreme Court of the United States

OCTOBER TERM, 1983

---

No. 83-850

UNITED STATES OF AMERICA, PETITIONER

*v.*

JAMES CONNORS KARO, ET AL.

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

---

## REPLY BRIEF FOR THE UNITED STATES

---

In support of their contention that the warrantless installation and monitoring of a beeper violates the Fourth Amendment, respondents invoke general Fourth Amendment principles governing searches of homes and containers, but they do not adequately explain why these principles should apply to the use of the beeper in this case. It is true that the beeper was physically present inside a container when the container was transferred to respondents, and that the container was situated inside at least one residence and two storage lockers on occasions when the beeper's signals were monitored by law enforcement agents. However, this factual recitation merely poses, and does not answer, the legal questions presented here. It is not enough for respondents to assert that the monitoring of a beeper while it is inside a home "is exactly the same" as a search of the home by a police officer (Karo Br. 3), or that such monitoring, if not subject to antecedent judicial control, "would

completely invade the privacy of our citizens" (Harley Br. 26).[1] We suggest that few disinterested persons would join respondents in the assertion that the physical entry of government officials into their home involves no greater invasion of privacy than the monitoring of a beeper signal emanating therefrom. In any event, respondents' ipse dixits are no substitute for legal analysis.

As we have shown in our opening brief, proper consideration of the Fourth Amendment implications of beeper use cannot proceed without first focusing on the precise nature of the information conveyed by a beeper and then determining the extent, if any, to which the beeper's disclosure of that information infringes protected privacy interests. It is our position that the limited information disclosed by the beeper in this case, concerning the movement and location of the can of ether, was not in any meaningful sense information as to which respondents could have harbored a legitimate expectation of privacy. Alternatively, we submit that any intrusion upon protected privacy interests was so minimal that use of the beeper may be upheld in the absence of a warrant and probable cause. Respondents' briefs are largely unresponsive to our principal contentions.

1. Respondents argue (Karo Br. 30-32; Harley Br. 12-13, 29) that the can of ether was a closed container in which respondents Karo, Horton, and Harley (all of whom apparently contributed to the purchase of the ether) had legitimate expectations of privacy, and that therefore the presence of the beeper in the can at the time it was transferred to respondents constituted a "search" of the can, analogous to the search of the luggage in *United States* v. *Chadwick*, 433 U.S. 1 (1977). As this Court recently explained, however, "[a] 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed" (*United*

[1] If these characterizations accurately described the substance of what transpired, we would of course readily concede that a warrant supported by probable cause was necessary.

*States* v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984), slip op. 3 (footnote omitted)). Assuming for present purposes that the agents would have had to obtain a warrant before they could open the can and examine its contents (but cf. *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983); *Arkansas* v. *Sanders*, 442 U.S. 753, 764-765 n.13 (1979)), it does not at all follow that the beeper's mere presence in the can, without more, was a search of the can. It is only with respect to the contents of the can that the can's owners could claim any protected privacy interest. Even when monitored, however, the beeper revealed no information about the contents of the can. Thus, respondents cannot claim that the beeper's mere presence in the can amounted to a "search."[2]

Respondents rely on the court of appeals' statement (Pet. App. 7a) that "[a]ll individuals have a legitimate expectation of privacy that objects coming into their rightful ownership do not have electronic devices attached to them, devices that would give law enforcement agents the opportunity to monitor" the location and movement of the objects. This analysis is flawed for several reasons. First, it assumes that there is a legitimate expectation of privacy in the location and movement of a container to which a beeper has been attached; but this is the very question that must be addressed in determining whether the *monitoring* of a beeper is a Fourth Amendment search. Second, unless it is monitored, a beeper discloses no information at all. Accordingly, it is obvious that the intrusion, if any, into legiti-

---

[2] Respondents do not argue, nor could they, that the beeper's mere presence constituted a "seizure" of the can. "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property" (*United States* v. *Jacobsen*, slip op. 3 (footnote omitted)). The beeper's presence did not interfere in any way with respondents' possessory interests in the can. Until the can was actually seized during the search of the Taos residence, respondents were free to do—and in fact did—what they liked with the can and its contents.

mate privacy interests occurs when the beeper is monitored to disclose the location of the container in which it has been installed. There is simply no basis in the Fourth Amendment for concluding that an unmonitored beeper effects a "search." While philosophers may debate whether a tree falling in a remote, uninhabited forest produces a sound, such metaphysical musings are far removed from the practical considerations that must be addressed in deciding questions of Fourth Amendment law. In short, the fact that the beeper's presence inside the container provides the agents with an "opportunity" to monitor the container's location does not, by itself, transform that presence into a "search."

Respondents erroneously contend (Karo Br. 33) that the court of appeals' ruling on the installation issue "was *dictum*, or, at most, an alternative rationale" for affirming the suppression order as to Karo. On the contrary, the alleged violation of Karo's rights resulting from the installation of the beeper was the only ground articulated by the court below in support of its ruling that Karo could seek suppression of the evidence seized in the course of the warrant-authorized search of the Taos residence (Pet. App. 13a-14a). Although it is true that the beeper assisted the agents in ascertaining that Karo had transported the cans of ether from informant Muehlenweg's residence to his home, Karo established no legitimate expectation of privacy in any of the other locations to which the ether was traced as a result of the beeper monitoring,[3] and the agents' ability to monitor the beeper at those other locations was not at all dependent on their monitoring of the beeper while it was at Karo's house.

---

[3] Ownership of the can clearly did not confer upon Karo a legitimate expectation of privacy in each of the places to which the can was taken in the course of the beeper surveillance. See *United States* v. *Salvucci*, 448 U.S. 83, 91-93 (1980).

Moreover, there is no merit to respondents' additional contention (Karo Br. 33-34) that the monitoring of the beeper at Karo's house violated Karo's legitimate privacy expectations. Respondents' effort to distinguish this case from *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983), because here the beeper may have been monitored while it was inside Karo's residence, is unavailing. As we have pointed out in our opening brief (at 24-27), the limited information conveyed by a beeper—that it has arrived at or is present in the vicinity of a particular location—is precisely the same (and has the same value for law enforcement purposes) regardless whether the beeper is broadcasting its signals from inside or outside a particular structure. Although the agents in this case did not actually see Karo transfer the cans of ether from the car to his house, Karo—who had the burden of establishing that his Fourth Amendment rights were violated by the challenged law enforcement activity (*Rakas* v. *Illinois*, 439 U.S. 128, 131 n.1 (1978))—presented no evidence that he in fact brought the cans into his house and that the transfer of the cans was not visible from the adjacent public areas. His case, like that of the other respondents (who also failed to present such evidence), is therefore analytically indistinguishable from that of the defendant in *Knotts*. There, the agents did not actually observe the arrival on the defendant's property of an automobile carrying the beeper-laden can of chemicals; the Court nevertheless held that because the fact of the car's arrival could have been ascertained by visual surveillance from public places adjoining the defendant's property, the use of the beeper to obtain that information did not violate the defendant's legitimate expectations of privacy.[4]

[4] Moreover, the agents' having lawfully learned that the can arrived at Karo's house, and having subsequently ascertained without "searching" any private area of Karo's that it had moved to other locations, there is no way in which any of the suppressed evidence could possibly be said to be a fruit of any monitoring that was undertaken while the container remained on Karo's property.

2. Respondents argue (Karo Br. 8, 11; Harley Br. 15-18) that even though the monitoring of a beeper provides only limited information, it nevertheless constitutes a "search" for Fourth Amendment purposes whenever the beeper happens fortuitously to be physically situated within a house at the time its signals are monitored. First, they assert that any investigative procedure that reveals even a limited amount of information about the contents of an area in which a person has a legitimate expectation of privacy is necessarily a search. Second, they assert that any investigative procedure that results in the disclosure of information and that is accompanied by a physical intrusion into a private area is subject to the Fourth Amendment. These assertions are incorrect as a matter of law and are also largely irrelevant to the investigative procedure at issue here.

Respondents' first assertion, that the minimally intrusive nature of a beeper is irrelevant in determining whether its use is subject to regulation under the Fourth Amendment, is contrary to this Court's recent decisions in *United States* v. *Place*, No. 81-1617 (June 20, 1983), and *United States* v. *Jacobsen*, *supra*. The holding in *Place*, that a sniff of luggage by a narcotics detection dog is not a search, rested on the recognition that this investigative procedure is "limited both in the manner in which the information is obtained and in the content of the information revealed" (slip op. 11). The Court pointed out (*id.* at 10-11):

> A "canine sniff" by a well-trained narcotics detection dog * * * does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item.

> Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

Relying on *Place*, the Court in *United States* v. *Jacobsen*, slip op. 12-14, held that a field test conducted by a law enforcement agent that revealed that a suspicious powder contained cocaine did not constitute a "search" within the meaning of the Fourth Amendment. Because the test could reveal only "whether a substance is cocaine, and no other arguably 'private' fact," the Court concluded that its use did not compromise any legitimate privacy interest (*Jacobsen*, slip op. 13).

Respondents' second assertion, that the reach of the Fourth Amendment turns not on the information disclosed by a particular investigative procedure but on notions of physical trespass, is precisely the kind of analysis that was abandoned by this Court in *Katz* v. *United States*, 389 U.S. 347, 353 (1967). See also *Hester* v. *United States*, 265 U.S. 57 (1924); *United States* v. *Knotts*, slip op. 4, 9. Most recently, in *Jacobsen*, the Court expressly rejected the argument that the dog sniff in *Place* could be distinguished from a field test of a suspicious substance on the ground that a dog sniff involves no physical invasion of an individual's effects. Instead, the Court explained that the reason the investigative procedure in *Place* did not intrude upon any legitimate privacy interest was that the procedure revealed only a limited piece of information (*i.e.*, the presence or absence of contraband in a closed suitcase). *Jacobsen*, slip op. 14 n.24.[5]

---

[5] Respondents' efforts (Karo Br. 21-22; Harley Br. 22) to distinguish this case from *Place* are to no avail. The disclosure of the public movements of a can in which a beeper has been installed

Beyond this, as we pointed out in our opening brief, agents monitoring a beeper are often unable to determine whether the beeper is located inside a particular house, rather than on a porch or in an adjacent yard. Thus, even where the beeper may in fact be broadcasting from inside a residence, it often will not disclose that information to the authorities.[6] Moreover, to agents attempting

---

and of the arrival of the can at a particular location is no more a search than the disclosure that a closed piece of luggage contains contraband. As noted above, this Court has refused to distinguish the dog sniff from other investigative procedures on the ground that it involves no physical penetration of a person's effects. See *Jacobsen*, slip op. 14 n.24. The fact that the luggage is usually located in a public place when it is detained and subjected to a dog sniff does not diminish the owner's traditional expectation of privacy in the contents of his luggage. While the detention of luggage for an extended period of time might render the seizure of the luggage unreasonable, the intrusion, if any, into legitimate privacy interests that is associated with beeper surveillance (like that associated with visual surveillance) does not increase as a function of the duration of the surveillance. In addition, the period of surveillance is determined largely by the actions of the suspects themselves: where, as in *Knotts*, the suspects transport the beeper-laden object directly to the site of the laboratory, the period of surveillance will be brief; where, as here, the suspects transport the object to a variety of different locations over a period of more than four months in order to avoid detection, the period of surveillance will be more lengthy.

[6] The beepers utilized by the Drug Enforcement Administration broadcast their signals on VHF frequencies assigned by the National Telecommunications and Information Administration, an agency within the Department of Commerce. A beeper operates on one watt of power (as compared to five watts for a walkie-talkie); its signal is therefore not very powerful. Under normal operating conditions, a beeper's signal can be monitored from two to four miles away on an open road and from 20 miles away from the air. Because obstructions will interfere with the reception of VHF signals, beepers have a very short range (about two blocks) in congested urban areas.

The monitoring of a beeper is quite different from the monitoring of a transponder, which is used to track the location of airplanes. A transponder (which the Federal Aviation Administration requires for aircraft of a certain size) will emit a signal only in response to a signal sent from a radar station. The transponder's

to track the movement of precursor chemicals, the information conveyed by a beeper has essentially the same utility whether the beeper is broadcasting from inside or outside a particular structure: for purposes of following the chemicals to the next location, or of obtaining a warrant to search the place where the chemicals are presently situated, the precise location of the chemicals is of little or no moment. Finally, and most importantly, as this Court held in *Knotts*, the information conveyed by a beeper is not information as to which an individual can reasonably be said to harbor a legitimate expectation of privacy, because the movements of a vehicle over public roads and the arrival of a container at a particular location are subject to disclosure through visual surveillance. The beeper in this case did not disclose what was done with the ether inside any of the places to which it was traced: it revealed nothing about any movement of the ether inside any of the premises, or about whether the ether was being used for any purpose.[7]

---

signal enables the radar equipment to determine the plane's location by calculating the time it takes for the transponder to respond to the initial signal. A beeper, on the other hand, sends out continuous signals. Agents monitor the beeper's signals from two different points and, by using principles of triangulation, they can determine the beeper's approximate location. When monitoring from a distance, the agents cannot pinpoint the beeper's location; the location can be determined more precisely the closer the agents get to the signal. On a sidewalk, within 25 to 50 feet of a residence, agents may be able to ascertain whether a beeper is broadcasting from the front or back of a house, or from the right or left side of the structure. In order to avoid detection, however, agents monitor the signals from a position where they are out of sight of the suspects. Thus, as was the case here (see our opening brief at 25 n.9), the agents often do not get close enough to determine whether a beeper is inside or outside of particular premises.

[7] Contrary to respondents' contention (Harley Br. 19), the beeper did not disclose that the ether was located in locker 15 at the second storage facility. Rather, the beeper revealed only that the ether was in one of the lockers. The agents first suspected that the ether was in locker 15 when they detected the odor of ether

In short, there is no merit to respondents' heavy-handed efforts to analogize the use of the beeper in this case to a traditional "search" of the numerous locations to which the beeper led the agents in the course of their investigation. The only searches that actually occurred (at the first storage locker and at the Taos residence) were undertaken pursuant to search warrants. Because the beeper revealed information only about the public movements of the can of ether, and because it did so in a way that avoided the invasion of privacy entailed in a traditional search (in which highly personal items or activities may be exposed to official eyes), the monitoring of the beeper was not a "search" within the meaning of the Fourth Amendment.

3. If the use of the beeper in this case is deemed a "search" of private premises, then, according to respondents (Karo Br. 11-28; Harley Br. 19-23), it must be treated like any other such search—viz., it must be supported by a warrant issued on probable cause. But there

---

emanating from that locker. Their suspicions were confirmed when they learned that that locker had been rented by two individuals driving a red and white pickup truck on the same day that Horton had removed the cans of ether from the first storage facility and had loaded them into a similarly described truck. J.A. 55-56. Thus, respondents' claim that visual surveillance alone would have proven ineffective in locating the ether ignores the fact that the agents have other investigative techniques at their disposal, including their sense of smell and the ability to question witnesses.

Similarly, respondents' reference (Karo Br. 6) to the fact that the beeper disclosed that the ether was inside the Taos residence is of little, if any, relevance. The agents visually followed Horton's truck to that residence (J.A. 57); they knew from a confidential informant that a residence in Taos contained a laboratory in which Horton and his associates were engaged in extracting cocaine from clothing (J.A. 59-60); and they observed the windows and doors of the residence wide open on a cold, windy day, strongly suggesting that the ether was being utilized inside the residence (J.A. 58, 60-61). Thus, the beeper merely supplemented the information that was available to the agents from other sources and enabled the agents to maintain surveillance while avoiding detection.

is nothing in the Fourth Amendment that requires the reasonableness of all searches to be judged under identical standards, without regard to the degree of intrusion into legitimate privacy interests.

Of course, the Fourth Amendment ordinarily requires that a neutral magistrate must determine that there is probable cause to believe that evidence of criminal activity may be found at a particular residence or other private premises before law enforcement officers may enter and conduct a search. One reason why the warrant requirement is strictly enforced in this situation is because it is inevitable that, in the course of searching private areas for specified items, the police will be exposed to a wide range of lawful private activity. Thus, the warrant requirement assures that significant breaches of the privacy of the home or other private areas will occur only when approved by a neutral judicial officer. In the case of a beeper, however, the information conveyed is so limited that any intrusion into legitimate privacy interests is qualitatively as well as quantitatively different from the intrusions accompanying traditional searches that must be authorized by a warrant. Thus, even if the activity is technically classified as a search, it is reasonable to permit the police to monitor a beeper's signals on the basis of a degree of suspicion falling short of probable cause, and without obtaining a warrant. It bears emphasis, however, that where beeper surveillance provides agents with probable cause to believe that evidence of crime is located at particular private premises, they may not enter and search those premises until after they have obtained a traditional search warrant.

a. Respondents contend (Karo Br. 19; Harley Br. 21) that the principles of *Terry* v. *Ohio*, 392 U.S. 1 (1968), and its progeny are inapplicable here because the *Terry* line of cases involved exigent situations in which it would have been impractical to obtain a warrant. Respondents entirely miss the point of *Terry* and of our reliance on it.

In *Terry* and subsequent cases, the Court held that certain law enforcement actions, although they are searches or seizures regulated by the Fourth Amendment, need not be supported by probable cause but may instead be justified on the basis of reasonable suspicion that criminal activity is afoot. In other words, where a given technique is minimally intrusive with respect to individual privacy interests while at the same time valuable in advancing significant societal interests, it is reasonable to permit use of the technique without requiring the existence of probable cause. As the Court stated in *Adams* v. *Williams*, 407 U.S. 143, 145 (1972):

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response.

Although it is true that the Court in *Terry* observed that the particular police activity at issue was not subject to the warrant procedure (392 U.S. at 20), once the Court determined that the activity was one that may be reasonable without probable cause, it followed that no warrant *could* be required for such conduct, since "[a] warrant may issue only upon 'probable cause.'" *South Dakota* v. *Opperman*, 428 U.S. 364, 383 (1976) (Powell, J., concurring).

In considering whether the *Terry* model is an apt one to apply to beeper surveillance, the issue thus has to do not with the procedural aspects of the Fourth Amendment embodied in the warrant requirement, but with the substantive standard by which use of the technique is to be governed. Ordinary visual surveillance of suspects by agents who do not enter private premises is not regulated at all by the Fourth Amendment. If beeper surveillance, which essentially provides equivalent information with greater safety and efficiency, is to be regulated,

it seems to us more than adequate protection of the privacy interests at stake to restrict such surveillance to cases in which reasonable suspicion of criminal activity exists. By requiring the higher standard of probable cause (and only in that case would any question of a warrant requirement arise), we submit that the Court would be unreasonably restricting the use of this valuable technique in a significant class of cases in which there exists a substantial suspicion of illicit activity, and in which use of the beeper would be more valuable and perhaps less intrusive in dispelling or substantiating the suspicion than other available investigative means.[8]

b. Respondents have no effective response to our argument that imposition of a warrant requirement in the beeper context would not serve the policies underlying the Fourth Amendment's Warrant Clause in any meaningful way.[9] Respondents argue (Karo Br. 25-26; Harley

[8] For example, one type of case in which a beeper is used during the early phases of an investigation is where the DEA receives information from a chemical distribution company of suspicious orders of large quantities of precursor chemicals useful in manufacturing illicit controlled substances. Standing alone, such information might not amount to probable cause sufficient to support a warrant, yet it might well call for the institution of surveillance to determine whether the chemicals are to be put to illegal use. Installation of a beeper may be the only practical and effective means for conducting such surveillance, yet it would be unlawful for DEA to employ it if probable cause is established as the substantive standard for beeper use. We do not believe such a rule would be reasonable.

[9] Respondents wholly misapprehend our argument on this point. We do not contend that it is always or even usually infeasible for the authorities to obtain a beeper warrant if probable cause exists (although, in the early stages of an investigation, when visual surveillance and use of beepers are likely to be most productive, probable cause may be absent). Instead, we contend that the magnitude of the intrusion on protected privacy interests is an important consideration in determining whether the Fourth Amendment imposes a probable cause or warrant requirement before law

Br. 23) that a beeper warrant can particularize the container in which the beeper is to be installed and can recite that ascertainment of the unknown places to which the beeper will be taken are the things to be "seized" by the beeper surveillance (information that is neither persons, houses, papers, nor effects). It seems to us that this boilerplate exercise—which calls for the procurement of a warrant rather closely resembling the hated writs of assistance—would trivialize, rather than advance, the interests served by the Fourth Amendment.[10]

4. Respondents argue (Karo Br. 18, 29; Harley Br. 24-28) that, without the restrictions imposed by a warrant requirement, government agents would be free to undertake continuous surveillance of any citizen, without the knowledge and supervision of the judiciary. This argument is virtually identical to one the Court expressly rejected in *Knotts* (slip op. 7-8):

> [T]he fact is that the "reality hardly suggests abuse," *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 566 (1978); if such dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable. *Ibid.* Insofar as respondent's complaint appears to be simply that scientific devices such as the beeper enabled the police to be more effective in detecting crime, it simply has no constitutional foundation. We have never equated police efficiency with unconstitutionality, and we decline to do so now.

Contrary to respondents' contention (Karo Br. 29), the beeper monitoring in this case did not "continuously

---

enforcement officers may undertake a particular investigative procedure.

[10] We note that it does not follow even from a substantive standard of probable cause that a warrant is necessary. Respondents overlook this Court's automobile search cases, which uphold warrantless searches in the absence of exigent circumstances because of the individual's reduced expectations of privacy in an automobile. See, *e.g.*, *Michigan* v. *Thomas*, 458 U.S. 259 (1982).

invade[] the private activities of six defendants, an undetermined number of uninvolved people, four houses and two storage lockers for five months." In fact, the only "activities" the beeper disclosed were the public movements of the cans of ether, as respondents and their confederates transported them from place to place over a period of several months in an effort to avoid detection by the authorities. Although the period of beeper surveillance in this case was much longer than that in *Knotts*, the monitoring here was no more intrusive on privacy interests than that in *Knotts*. If respondents are correct in asserting that the applicability of the warrant requirement turns on the duration of beeper surveillance, then drug dealers like respondents will have a ready formula for ensuring that the fruits of any beeper surveillance of their public movements would be subject to challenge on grounds that have no relation to the minimal nature of the intrusion or non-private nature of the information acquired.

Here, as in *Knotts*, respondents' argument at bottom reflects the view that our governmental institutions are incapable of controlling abuses of police activities if virtually all facets of those activities are not held to be subject to prior judicial scrutiny under the Fourth Amendment. The exceedingly pessimistic vision that respondents conjure up is in fact far removed from the realities of contemporary American society. Thus, today at least, the concerns raised by respondents seem theoretical and speculative. But even granting their legitimacy it does not follow that the Fourth Amendment is the only available mechanism to safeguard against such abuses. Should beepers (or policemen on foot) be employed to follow the movements of persons because of their unpopular views or for other invidious purposes, there are other safeguards that may be more appropriately invoked, including the First Amendment or equal protection concepts derived from the Fifth and Fourteenth Amendments. Cf. *Oyler* v. *Boles*, 368 U.S. 448 (1962). And,

of course, the legislative process is also available if prophylactic measures are deemed necessary or appropriate to guard against potential abuses of modern, efficient law enforcement techniques.[11]

In short, the Fourth Amendment cannot properly be invoked to condemn legitimate police investigative techniques on the ground that such techniques—although not violative of traditional Fourth Amendment norms—might be subject to abuse under some imaginable scenario. Rather, it is necessary to examine the nature of the information disclosed by the particular law enforcement practice in order to determine whether its use infringes a legitimate expectation of privacy, and, if so, to balance the gravity of that invasion against other relevant in-

---

[11] Thus, we note that following this Court's decision in *United States* v. *Miller*, 425 U.S. 435 (1976), Congress enacted the Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, Tit. XI, 92 Stat. 3697 *et seq.*, in order "to protect the customers of financial institutions from unwarranted intrusion into their records while at the same time permitting legitimate law enforcement activity" (H.R. Rep. 95-1383, 95th Cong., 2d Sess. 33 (1978)). The House Report explicitly stated (*id.* at 34) that the legislation

> is a congressional response to the Supreme Court decision in * * * *United States* v. *Miller* which held that a customer of a financial institution has no standing under the Constitution to contest Government access to financial records. * * * [W]hile the Supreme Court found no constitutional right of privacy in financial records, it is clear that Congress may provide protection of individual rights beyond that afforded in the Constitution.

Similarly, following the decision in *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978), Congress enacted the Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 *et seq.*, to "afford[] the press and certain other persons not suspected of committing a crime with protections not provided currently by the Fourth Amendment" (S. Rep. 96-874, 96th Cong., 2d Sess. 4 (1980)). The Senate Report noted that the legislation was a response to the Court's statement in *Zurcher* that " 'the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses' " (S. Rep. 96-874, *supra*, at 5 (quoting *Zurcher*, 436 U.S. at 567)).

terests in deciding what regime of regulation is appropriate.

5. Finally, respondents contend (Karo Br. 34-40; Harley Br. 31-33) that even if their Fourth Amendment rights were not violated by the warrantless installation and monitoring of the beeper, the evidence seized at the Taos residence nevertheless should be suppressed under the Court's "supervisory powers." Specifically, respondents assert that certain misrepresentations in the affidavit supporting the issuance of the beeper warrant (see our opening brief at 4 n.3) justify suppression of the fruits of the beeper surveillance.

Respondents' contention is untenable in light of *United States* v. *Payner*, 447 U.S. 727 (1980). There, this Court expressly rejected the view "that a federal court should use its supervisory power to suppress evidence tainted by gross illegalities that did not infringe the defendant's constitutional rights" (*id.* at 733).[12] The Court explained (*id.* at 735-736 (citations and footnote omitted)):

> Our Fourth Amendment decisions have established beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices. The values assigned to the competing interests do not change because a court has elected to analyze the question under the supervisory power instead of the Fourth Amendment. In either case, the need to deter the underlying conduct and the detrimental impact of excluding the evidence remain precisely the same.

---

[12] *Cf. Franks* v. *Delaware*, 438 U.S. 154, 171-172 (1978), where the Court held that a deliberate falsehood or reckless disregard for the truth in a warrant affidavit will not invalidate the warrant so long as the remaining portions of the affidavit are sufficient to support a finding of probable cause.

Thus, if we are correct in our contention that the effectively warrantless beeper surveillance in this case did not violate respondents' Fourth Amendment rights, it follows under *Payner* that respondents may not invoke the supervisory power "as a substitute for established Fourth Amendment doctrine" (447 U.S. at 736 n.8).[13]

---

[13] Respondents' reliance on *United States* v. *Cortina*, 630 F.2d 1207 (7th Cir. 1980), is entirely misplaced. In *Cortina*, an agent deliberately lied in an affidavit for a search warrant in order to create probable cause where none in fact existed and also lied in his testimony at the suppression hearing. Noting that "[t]here was no probable cause for the search without the facts misrepresented by [the agent]" (630 F.2d at 1208), the court of appeals held that it was proper to suppress the fruits of the agent's misconduct as to all defendants (even those who may not have had a privacy interest in the searched premises) in order to preserve the integrity of the judicial system. Here, unlike in *Cortina*, ample probable cause existed. The misstatements that were made were intended to protect the identity of a cooperating informant, not to convey an impression of the existence of probable cause where none in fact existed. Thus, whether or not the misrepresentations were justified and whether or not *Cortina* was correctly decided, defects in the warrant cannot serve as a basis for suppressing the fruits of the beeper surveillance if we are correct that no warrant was required.

More apt to this case than *Cortina* is *United States* v. *Broward*, 594 F.2d 345 (2d Cir.), cert. denied, 442 U.S. 941 (1979). There, the government presented to a magistrate an affidavit for an arrest warrant that falsely characterized an informant as a co-defendant and that contained other factual misrepresentations designed to conceal the informant's cooperation in order to assure her safety (594 F.2d at 348). One of the defendants named in the arrest warrant was arrested in front of his apartment building. When the defendant stated that he wished to inform his wife that he was under arrest, he was accompanied back to his apartment by DEA agents, who, while standing in the apartment doorway, observed marijuana, hashish and a pipe in plain view inside the apartment (*id.* at 349). The agents then obtained a warrant to search the apartment, where they seized heroin, marijuana and drug paraphernalia. In reversing the district court's order suppressing this evidence, the Second Circuit rejected the argument that the evidence was the fruit of the factual misstatements in the arrest warrant affidavit. Noting that no warrant was required to effect the defendant's arrest in a public

For the foregoing reasons, and those stated in our main brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
*Solicitor General*

APRIL 1984

---

place on probable cause, the court concluded that the subsequent seizure of the evidence inside the apartment was the fruit of the lawful arrest and not of the arguably defective arrest warrant (*id.* at 350). Here too, assuming that respondents' Fourth Amendment rights were not violated by the warrantless beeper surveillance, respondents are not entitled to suppression of the fruits of that surveillance as a result of any improprieties connected with the affidavit supporting the beeper warrant. Like the defendants in *Broward*, respondents "suffered no prejudice" because "[n]o evidence was gathered that would not have been obtained absent the [ill-advised misrepresentations in the superfluous beeper warrant affidavit]" (*id.* at 351).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421023 829

Office - Supreme Court, U.S.
FILED
APR 2 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-850

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
*Petitioner*

v.

JAMES CONNERS KARO, ET AL.,
*Respondents*

**On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

## AMICUS CURIAE IN SUPPORT OF RESPONDENT

GOLDSTEIN, GOLDSTEIN & HILLEY
GERALD H. GOLDSTEIN
ROBERT B. HIRSCHHORN
RALPH A. LOPEZ
2900 Tower Life Building
San Antonio, Texas 78205

*Attorneys for the National Association of Criminal Defense Lawyers*

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

## QUESTION PRESENTED

Whether maintenance and monitoring of an electronic tracking device from within a zone of privacy requires a warrant for a specific and reasonable period of time.

## INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia nonprofit corporation whose membership is comprised of more than 2,500 lawyers who are citizens of every State and all of whom are primarily engaged in positions bringing them into daily contact with the criminal justice system, as advocates, law professors or judges of the State or federal courts.

Among NACDL's stated objectives is to promote the proper administration of criminal justice and to thereby concern itself with the protection of individual rights and the improvement of the criminal law, its practices and procedures. A cornerstone of this organization's objective, and of our criminal justice system, is the fundamental constitutional protection of an individual's Fourth Amendment rights, and NACDL is very concerned about any decision that would undercut or dilute this constitutional guarantee. Indeed, the position taken by the United States government in the instant case undercuts the important constitutional safeguards provided by the Fourth Amendment and conflicts with several Supreme Court and Court of Appeals decisions on the subject.

The Amicus Curiae Committee of the NACDL has discussed this case and decided that this issue is of such importance to defense lawyers throughout the nation that NACDL should take a position and offer its assistance to the Court.

# TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | I |
| INTEREST OF AMICUS | II |
| AUTHORITIES | III |
| SUMMARY OF ARGUMENT | 1 |
| ARGUMENT AND AUTHORITIES | 2 |
| I. MONITORING A SIGNAL EMITTED FROM A ZONE OF PRIVACY | 2 |
| *UNITED STATES V. KNOTTS* DOES NOT COMPEL CONTRARY RESULT | 6 |
| II. DURATION OF TRACKING DEVICE MUST BE LIMITED | 9 |
| ABUSE OF BEEPER USE | 10 |
| III. POLICY CONSIDERATIONS | 15 |
| CITIZENS HAVE A RIGHT TO ENJOY GOODS WITHOUT UNINVITED MONITORING | 16 |
| TECHNOLOGICAL ADVANCES HEIGHTEN NEED FOR FOURTH AMENDMENT PROTECTIONS | 17 |
| CONCLUSION | 19 |


# TABLE OF AUTHORITIES


| CASES | Page |
|---|---|
| *Berger v. New York*, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed. 2d 1040 (1967) | 10 |
| *Boyd v. United States*, 116 U.S. 616 (1886) | 5 |
| *Clinton v. Virginia*, 377 U.S. 158 (1965) | 3 |
| *Dalia v. United States*, 441 U.S. 238 (1979) | 4, 19, 20 |
| *Edwards v. California*, 314 U.S. 160 (1941) | 13 |
| *Johnson v. United States*, 333 U.S. 10 (1948) | 10 |
| *Silverman v. United States*, 365 U.S. 505 (1961) | 2, 3, 7 |
| *Smith v. Maryland*, 442 U.S. 735 (1979) | 19 |
| *United States v. Allen* (9th Cir. 1980) 633 F.2d 1282 | 12 |
| *United States v. Bailey* (6th Cir. 1980) 628 F.2d 938 | 3, 4, 10 |

CASES — Page

*United States v. Brock* (9th Cir. 1982) 687 F.2d 1311 ... 9, 11, 12
*United States v. Butts* (5th Cir. 1983) 710 F.2d 1139 .... 6, 10, 18
*United States v. Cady* (5th Cir. 1981) 651 F.2d 1296 .... 12, 13
*United States v. Cassity* (6th Cir. 1983) 720 F.2d 451 ... 3, 6
*United States v. Cofer* (W.D. Tex. 1978) 444 F.Supp. 146 .....10, 12, 14, 15
*United States v. Curtis* (9th Cir. 1977) 562 F.2d 1153 .... 10
*United States v. Dubrofsky*, 581 F.2d 211 ..... 12
*United States v. Guest*, 383 U.S. 745 (1960) ..... 13
*United States v. Karo* (10th Cir. 1983) 710 F.2d 1433 ..3, 8, 14, 16
*United States v. Katz*, 389 U.S. 347 (1967) .....12, 13, 20
*United States v. Knotts*, ____U.S.____, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) .....1, 2, 3, 6, 7, 8, 9, 10, 11, 19
*United States v. Kupper*, 693 F.2d 1132 ..... 9
*United States v. Lewis* (5th Cir. 1980) 621 F.2d 1382 ... 16
*United States v. Michael* (5th Cir. 1981) 645 F.2d 252 .. 13, 16
*United States v. Moore* (1st Cir. 1977) 562 F.2d 106 ....3, 4, 5, 10
*United States v. Parks*, 684 F.2d 1085 ..... 9
*United States v. Sheikh* (5th Cir. 1981) 654 F.2d 1057 ... 3
*Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) ..... 11

STATUTES

18 U.S.C. § 2518(5) ..... 14, 15

MISCELLANEOUS

Annot., 57 A.L.R. Fed. 646 (1980) ..... 19
Carr, Electronic Beepers, 4 Search & Seizure L. Rep. No. 4 (1977) ..... 19
Dowling, "Bumper Beepers" and the Fourth Amendment, 13 Crim. L. Bull. 266 (1977) ..... 19
Fisher, *Wiretapping and Eavesdropping* (1978) ..... 14
Marks & Batey, Electronic Tracking Devices: Fourth Amendment Problems and Solutions, 67 Ky. L. J. 987 (1978) ..... 19
Note, Electronic Tracing Devices & Privacy: See No Evil, Hear No Evil, But Beware of Trojan Horses, 9 Loy. U. Chi. L. J. 227 (1977) ..... 19
Note, Finders Keepers, Beepers Weepers: *United States v. Knotts*—A Realistic Approach to Beeper Use and the Fourth Amendment, 27 St. Louis U. L. J. 483 (1983) 19
Note, Tracking Katz: Beepers, Privacy, and the Fourth Amendment, 86 Yale L.J. 1461 (1977) ..... 19

NO. 83-850

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
*Petitioner*

v.

JAMES CONNERS KARO, ET AL.,
*Respondents*

**On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

## AMICUS CURIAE IN SUPPORT OF RESPONDENT

### SUMMARY OF ARGUMENT

A warrant is required to monitor a signal emitted from a beeper secreted within a zone of privacy. This Court's decision in *United States v. Knotts*, 103 S.Ct. 1081 (1983) does not compel a contrary result inasmuch as the beeper in that case was never monitored from a zone

of privacy as here but, rather, only from an automobile travelling over public thoroughfares or from a cannister sitting outside a cabin in what this Court described as an "open-field". Indeed, this Court indicated in *Knotts, supra,* that if it had been confronted with facts such as these, prior authority such as *Silverman v. United States,* 365 U.S. 505 (1964) may have compelled a different result.

Moreover, a warrant is especially necessary considering the potentially infinite duration of such beepers and the potential for Government abuse in monitoring the activities of innocent citizens to whom the non-contraband item within the beeper is secreted has been transferred.

Finally, this Court should note the ever increasing potential for Governmental abuse created by the technological onslaught of the past decade and should be especially sensitive to the Fourth Amendment values threatened thereby.

## I.

## MONITORING A SIGNAL EMITTED FROM A ZONE OF PRIVACY

The position propounded by the Government will truly mark the ushering in of the "Big Brother" state as envisioned by George Orwell. Specifically, the monitoring of non-contraband personal property contained within a dwelling without resort to the judicial process will allow the Government to monitor the actions of an unlimited number of persons[1] for an unlimited period of time.

1. When beepers are attached to conveyances such as airplanes, automobiles, or even drums, there exists the very realistic possibility that innocent third party purchasers will unwittingly have their every move monitored and scrutinized by the Government.

There should be little question that if an individual has a sufficient privacy interest in an area to require a warrant for entry into that area, such privacy expectation should be sufficient to require judicial scrutiny of any surreptitious monitoring of the signal emitted from within that zone of privacy. *See: Silverman v. United States,* 365 U.S. 505 (1961) [where the Supreme Court held a warrant was required to install and monitor a microphone into an adjoining wall on the grounds that same was "accomplished by means of an authorized physical penetration" constituting "an actual intrusion into a constitutionally protected area"]; *Clinton v. Virginia,* 377 U.S. 158 (1965).

This concept of monitoring from a "zone of privacy" has been recognized by a number of courts, *United States v. Knotts,* ____ U.S. ____, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983); *United States v. Cassity* (6th Cir. 1983) 720 F.2d 451; *United States v. Bailey* (6th Cir. 1980) 628 F.2d 938, at p. 944; *United States v. Moore,* (1st Cir. 1977) 562 F.2d 106, at p. 113; where personality transmits from a private area. In *United States v. Sheikh* (5th Cir. 1981) 654 F.2d 1057, the Fifth Circuit noted there was a heightened privacy concern where the Government was monitoring from a "place hidden from public view" at p. 1071. However, because the container there contained "known contraband" the Court did not reach this issue.[2]

---

2. Nor is the Court confronted with this issue in the instant case. While the Courts have been reluctant to recognize a reasonable expectation of privacy in contraband, they have refused to extend this rule to substances (like ether) which are lawfully possessed but suspected of use in criminal activity. *United States v. Karo,* 710 F.2d 1433, 1436 (10th Cir. 1983); *United States v. Knotts,* 662 F.2d 515 (8th Cir. 1981) *rev'd on other grounds,* ____U.S.____, 103 S.Ct.

Furthermore, the warrant requirement for monitoring a transmission from within an area of expected privacy is underscored by the Supreme Court's decision in *Dalia v. United States,* 441 U.S. 238 (1979) where, considering the inverse proposition, the Court held that a warrant to monitor from within a constitutionally protected area presupposed the right to physically penetrate that area to install such device, indicating that the paramount concern with electronic surveillance into a protected area is its continuing nature rather than the initial intrusion.

In *United States v. Moore* (1st Cir. 1977) 562 F.2d 106, at p. 112, the First Circuit recognized that a "beeper" transforms the vehicle " . . . into a messenger in the service of those watching it and while a driver has no claim to be free from observation while driving in public, he properly can expect not to be carrying around an uninvited device that continuously signals his presence". And although the Court in *Moore* held that no warrant was required to monitor a transponder attached to the exterior of the vehicle,[3] where the transmitter being monitored is emitting its signal from within an area where one has a reasonable expectation of privacy[4] a warrant

---

1081, 75 L.Ed.2d 55 (1983); *United States v. Bailey,* 628 F.2d 938, 944 (6th Cir. 1980); *United States v. Moore,* 562 F.2d 106, 111 (1st Cir. 1977).

3. The First Circuit went on "to hold while the lessened expectance of privacy associated with motor vehicles justifies the use of beepers without a warrant to track vehicles, this can be done only if the officers have probable cause at the time." *United States v. Moore,* at pp. 112-3.

4. In *Moore,* the transmitter was placed inside chemicals which were ultimately taken by the defendants into a residence, at p. 113. Similarly, in the instant case, the Government acknowledged that they needed the electronic surveillance device and a directional finder in order to keep track of the drum when it was in the sundry dwellings and lockers.

*is* required not only for the entry but for the continued monitoring as well. *United States v. Moore, supra,* at p. 113, *United States v. Bailey* (6th Cir. 1980) 628 F.2d 938.

Just as in *Moore,* at p. 113, where the "beepers" were secreted within the chemical containers, transmitting their presence from inside the "privacy" of a residence, the "beepers" here transmitted from within a recognized zone of privacy inside numerous private dwellings and two private lockers, telling the authorities of its whereabouts, including its removal and relocation.

When Respondents withdrew from the public view, taking the drum of chemicals inside with them, they had every right to expect that their activities inside the various houses which they sought to preserve as private would be free from warrantless governmental intrusion. Since the drum containing the beeper was not contraband or otherwise illegally possessed by Respondents:

> "the Government had no right to determine their continued presence in the house by use of warrantless electronic surveillance. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedures." *U. S. v. Moore, supra* at p. 113, (citing *Boyd v. U. S.,* 116 U.S. 616, 635 (1886)).

In a recent decision, the Fifth Circuit concluded that a beeper broadcasting from within a zone of privacy constitutes a search:

> "In a very real sense, the beeper serves as a surrogate police presence that remains within the vehicle's interior and converts the area into a covert broadcast-

> ing station. Given the capacity of such devices to impart information, the introduction of these government-controlled objects into an area in which an individual legitimately retains an expectation of privacy constitutes an offensive invasion of fourth amendment values. The government, via its electronic counterpart, remains physically present . . . from the moment its agents enter until the tracking devices cease to function. In this age of electronic wizardry, it is not too much to suppose that beepers soon will have virtually unlimited lifespans. The continuing intrusion of such a device into a privacy-cloaked area, an intrusion that could potentially last from here to eternity, mandates protection. . . ."
> *United States v. Butts* (5th Cir. 1983) 710 F.2d 1139, 1149 (rehearing *en banc* granted).

*See also, United States v. Cassity* (6th Cir. 1983) 720 F.2d 451 (Pet. for Cert. pending, No. 83-1393) [whether beeper monitoring in a private home is characterized as a search or seizure is unimportant. (citation omitted). What is important is that it entails governmental intrusion into an area where privacy can be expected].

## *UNITED STATES V. KNOTTS* DOES NOT COMPEL CONTRARY RESULT

*United States v. Knotts*, ____U.S.____, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) does not compel a contrary result inasmuch as that case is distinguishable in that the Supreme Court in *Knotts* was not confronted with the issue of monitoring a beeper signal emitted from a "zone of privacy":

> "Respondent Knotts, as owner of the cabin and surrounding premises to which Petschen drove, undoubtedly had the traditional expectation of privacy within dwelling place insofar as the cabin was con-

> cerned. . . . But no such expectation of privacy extended to the visual observation of Petschen's automobile arriving on his premises after leaving a public highway; nor to movements of objects such as the drum of chloroform *outside the cabin in the 'open fields'*. [citation omitted]." (emphasis supplied) *United States v. Knotts*, ____U.S.____, 103 S.Ct. 1081, 75 L.Ed.2d 55, at p. 62 (1983).

Indeed, two Justices in *Knotts* indicated that if the Court had been considering a case of beeper monitoring from within a zone of privacy, the Fourth Amendment may have compelled a different result.

> "Cases such as *Silverman v. United States*, 365 U.S. 505, 509, 512 (1964), however, hold that when the Government does engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment even if the same information could have been obtained by other means." *United States v. Knotts*, ____U.S.____, 75 L.Ed.2d 55, at p. 65 (1983) (Justice Brennan joined by Justice Marshall *concurring in judgment*).

In discussing the impact of the *Knotts* decision, the Court of Appeals delineated the critical distinctions between the instant case and *Knotts*:

> "In the case before us the beeper was monitored while the can was within private residences and storage lockers. The beeper gave law enforcement officials information that could not be discovered by ordinary visual surveillance, even had that surveillance been constant. The *Knotts* case involved surveillance over only a few days; monitoring in the instant case took place over five months. In *Knotts*, the drum was never inside a residence; here the ether was inside four residences. In *Knotts* the offi-

> cers lost track of the automobile carrying the drum once on the public highway; here the officers lost track of the ether can for significant periods of time, after the ether had come to rest in residences and a rented locker. In the instant case, most of the tracing to new locations was possible only by use of the direction finder to locate the beeper.
>
> The monitoring of the beeper in the instant case was a different type of intrusion than that in *Knotts*, touching upon privacy interests that historically have been protected by the Fourth Amendment. We hold that the warrantless use of a beeper to monitor the location of noncontraband withdrawn from public view inside private residences or similarly protected places is an unconstitutional search or seizure." *U.S. v. Karo, supra,* at p. 1439.

*Knotts* does not stand for the proposition that monitoring of a beeper is permissible regardless of the circumstances of its use. *Knotts* does not authorize the Government to penetrate the sanctity of a private dwelling:

> "As we have noted, nothing in this record indicates that the beeper signal was received or relied upon after it had indicated that the drum containing the chloroform had ended its automobile journey at rest on respondent's premises in rural Wisconsin. Admittedly, because of the failure of the visual surveillance, the beeper enabled law enforcement officials in this case to ascertain the ultimate resting place of the chloroform when they would not have been able to do so had they relied solely on their naked eyes. But scientific enhancement of this sort raises no constitutional issues which visual surveillance would not also raise. A police car following Petschen at a distance throughout his journey could have observed him leaving the public highway and arriving at the cabin owned by respondent, with the drum of chloroform still in the car. This fact,

> along with others, was used by the government in obtaining a search warrant which led to the discovery of the clandestine drug laboratory. But there is no indication that the beeper was used in any way to reveal information as to the movement of the drum within the cabin, or in any way that would not have been visible to the naked eye from outside the cabin."
> *United States v. Knotts, supra,* at p. 64.

In *Knotts,* the Court held that monitoring did not invade any legitimate expectation of privacy and therefore there was neither a search nor a seizure. In reaching this conclusion, the majority of this Court relied on the "automobile exception", and the "open fields doctrine" to validate the electronic tracking. Central to both concepts is the notion that there exists a diminished expectation of privacy in those items subject to public inspection and scrutiny. Here, the governmental activity complained of is the warrantless monitoring of non-contraband personal property located in an area cloaked with a legitimate expectation of privacy, and nothing in the *Knotts* decision or this Court's previous treatment of search and seizure cases compels the reversal of the trial court or the Court of Appeals' ruling.

## II.

## DURATION OF TRACKING DEVICE MUST BE LIMITED

The continual presence of a beeper within a zone of privacy must be subjected to judicial scrutiny[5] so as to

---

5. *See U.S. v. Kupper,* 693 F.2d at 1132 n.2 1134 (noting that magistrate's order authorizing beeper installation "was limited in duration"); *U.S. v. Parks,* 684 F.2d at 1085 (characterizing beeper's presence in aircraft interior as "continuing physical intrusion or trespass"); *United States v. Brock* (9th Cir. 1982) 687 F.2d 1311,

assure citizens that the duration of the beeper's life will not be *ad infinitum* or unreasonable.[6]

> "We reiterate our belief that the invasion of protected privacy caused by beeper extends far beyond the initial entry required to affix the tracking device; indeed, the intrusion endures for the life of the beeper. See *Berger v. New York*, 388 U.S. 41, 59, 87 S.Ct. 1873, 1883, 18 L.Ed.2d 1040 (1967) (prolonged period of electronic surveillance equivalent to 'series of intrusions, searches, and seizures'). We are gravely disturbed by the prospect that such intrusions may continue *ad infinitum*, a concern echoed in the opinion of this and other circuits. The surest way to guarantee that such an intrusion does not exceed reasonable bounds is to require judicial supervision of the initial installation and continued maintenance of a tracking device when it is secreted within [a zone of privacy]."
> *United States v. Butts, supra*, at p. 1150.

## ABUSE OF BEEPER USE

In *Knotts*, this Court spoke of the potential abuse of beepers:

---

1322. ("[T]he [c]ourt cannot countenance the potentially unlimited duration of this type of surveillance '[location beepers]' ") (quoting with approval *United States v. Cofer* (W.D. Tex. 1978) 444 F.Supp. 146, 149-150; *Bailey*, 628 F.2d at 945 & n.12 (due to absence of termination date in authorizing warrant, beeper's presence could have continued "ad infinitum"); *United States v. Curtis* (9th Cir. 1977) 562 F.2d 1153, 1156 (expressing need for reasonable time limitations and other reasonable restrictions on beeper use); *United States v. Moore*, 562 F.2d 106, 113 n.4 (noting that duration of beeper use was limited and cautioning that additional safeguards might be required for expensive periods of beeper installation).

6. Judicial intervention is necessary since the courts have recognized that well-intentioned but over-zealous officers are often "engaged in the competitive enterprise of ferretting out crime." *Johnson v. United States*, 333 U.S. 10 (1948), and must resort to neutral and detached magistrate's for a determination of the reasonableness (i.e. probable cause) of their actions.

> "Respondent expresses the generalized view that the result of the holding sought by the government would be that 'twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision.' *Br. for Resp. at* 9 (footnote omitted). But the fact is that the 'reality hardly suggest abuse,' *Zurcher v. Stanford Daily*, 436 U.S. 547, 566, 56 L.Ed.2d 525, 98 S.Ct. 1970 (1978); if such dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles be applicable." *United States v. Knotts*, ____U.S.____, 75 L.Ed.2d 55, 63.

The reality of the instant case suggests the very abuse envisioned by Respondent Knotts. Here, the Government kept the drum of ether under 24 hour surveillance for a period of almost five (5) months.[7] Here, the Government's conduct evinces the "dragnet type law enforcement" that Respondent Knotts complained of. *Supra*, at p. 63. Accordingly, this Court must now "determine whether different constitutional principles may be applicable" and in light of the facts in this case, must address the issue expressly left unresolved in *Knotts*:

> whether the Fourth Amendment protects against unlimited warrantless monitoring from a zone of privacy.

The Government relies on the decision in *United States v. Brock* (9th Cir. 1982) 667 F.2d 1311 to support the proposition that the minimal intrusion occasioned by the use of the beeper installed in a non-contraband item taken into a private residence was not a search. What the

---

7. When the agents lost contact with the transponder, a directional locator was employed to determine the new situs of the beeper.

Government fails to point out is that the ruling in *Brock* was limited:

> "The principle upon which our holding rests is not without limits. Were the beeper to relate more information than simply location, its resemblance to the wiretap in *Katz* would increase. *At some point the duration of the monitoring would require the use of the particular sense-enhancement device to be characterized as a search. See United States v. Dubrofsky,* 581 F.2d at 211-12. It is important to note that the beeper in this case was monitored for only two days before a search warrant was sought. We note with approval the statement in *United States v. Cofer,* 444 F.Supp. 146 (W.D. Tex. 1978), addressing the question of continued beeper surveillance of unlimited duration:
>
> > [T]he [c]ourt cannot countenance the potentially unlimited duration of this type of surveillance [location beepers]. Citizens have a right to think that the government will not track them for months on end by resort to the latest electronic gadgetry.
>
> 444 F.Supp. at 149-50 (quoted with approval in *United States v. Allen,* 633 F.2d at 1289 n.5)." *United States v. Brock, supra,* at p. 1322 (emphasis supplied).

The Government also fails to address the omnipresent question of the duration of the tracking device. Petitioner seeks unlimited authority and discretion as to the time, place, and manner of monitoring. Analogizing the situation to the issuance of general warrants, the Court stated in *United States v. Cady* that such limitless action would not be tolerated:

> "It is too familiar to require citation that resistance to general warrants, unrestrained as to persons, times,

> or places, supplied much of the incentive for its [Fourth Amendment] adoption. Did we contemplate in this case an authorization, unlimited as to every one of these factors—time—or of such duration as to be unlimited as a practical matter, we might well . . . declare any action taken pursuant to it invalid." *U.S. v. Cady* (5th Cir. 1981) 651 F.2d 290.

It is the source of information obtained by the continued intrusion, potentially of unlimited duration, that violates the Respondent's expectation of privacy. The beeper conveys (forever) to the law enforcement personnel the location and direction of the targeted cannister. It further conveys that one or more individuals are moving same. Presuming that the Respondent sought to keep the location of the non-contraband goods a secret,[8] just as Mr. Katz[9] sought to keep his conversation confidential, the Government has made the Respondent's chattel an involuntary honing device:

> "The government, without Michael's consent or knowledge, made him into a broadcaster of the details of his own affairs. The listener is the government. The signals are simple. But they are damning. This is far from minimal. It strikes at the heart of the protection that the Fourth Amendment affords to the person and his affairs and effects in the relationship between him and his sovereign. This significant intrusion into Michael's affairs cannot be justified on the ground that the electronic device was attached to his automobile and the privacy interest in an automobile is not strong." *United States v. Michael, supra,* at pp. 271-2.

---

8. The beeper potentially creates a constitutional impediment or an individual's right to travel, *Edwards v. California,* 314 U.S. 160 (1941); *United States v. Guest,* 383 U.S. 745 (1960).

9. *U.S. v. Katz* 389 U.S. 347 (1967).

Continued monitoring and maintenance must be subjected to periodic judicial review so as to assure that the probable cause giving right to the initial intrusion warrants a continued invasion.[10] To hold otherwise would allow these electronic devices to remain for months, or even years[11] on end, allowing monitoring of a long series of unwilling, innocent purchasers who may have acquired title.[12]

Surveillance pursuant to any such warrant should terminate "upon attainment of the authorized objective *or upon expiration of the warrant*" specifying a reasonable time limitation upon monitoring (emphasis added). Fishman, *Wiretapping and Eavesdropping* (1978); § 150, at pp. 201-2; 18 U.S.C. § 2518(5). This is because monitoring of electronic surveillance of any type "is the equivalent of a series of intrusions, searches and seizures", and accordingly, the monitoring must be reasonably limited in time to insure that the facts warranting the initial intrusion are not too remote. As the Court in *United States v. Cofer, supra,* noted in establishing a 30-day limit upon monitoring an aircraft "beeper":

---

10. 18 U.S.C. § 2518 is a good example of where the Court requires additional probable cause to extend the monitoring.

11. Transponders, unlike beepers placed on the exterior of vehicles or cannisters have an unlimited duration since it feeds directly off the battery of the vehicle. The other beepers have a battery which may expire after several weeks or as in this case, months.

12. "The consent of one owner to have a beeper installed cannot suffice to continue the installation once the item belongs to someone else any more than the consent of a previous owner of a suitcase could suffice to permit the police to periodically open and search the suitcase after it comes under the ownership of another. Therefore, we hold that before the government agents could transfer the can of ether containing a beeper to Karo, they had to obtain an authorizing warrant." *United States v. Karo, supra,* at pp. 1438-9.

> "Citizens have a right to think that the government will not track them for months on end by resort to the latest electronic gadgetry." *United States v. Cofer, supra,* at p. 199.

In *United States v. Cofer, supra,* the Court established a thirty (30) day maximum period of duration for monitoring "beepers", applying the same standard as Title III of the Omnibus Crime Control Act.

> This Court is of the opinion that such a warrant should be issued for only a 30-day period, subject to the possibility of renewal at the end of that time if the circumstances warrant it. . . . 18 U.S.C. § 2518(5)." *United States v. Cofer* (W.D. Tex. 1978) 444 F. Supp. 146, at p. 150.

## III.

## POLICY CONSIDERATIONS

In deciding the critical issues presented herein, this Court must balance the conflicting interests of a citizen's expectation of privacy regarding non-contraband chattel maintained within his home, an area which has traditionally epitomized the concept of "zone of privacy", with the competing interests of law enforcement. And in determining whether law enforcement interests do indeed outweigh the Fourth Amendment interests occasioned by monitoring a beeper so situated without prior judicial authorization this Court ought to consider the various decisions of other courts in this troublesome area of Fourth Amendment jurisprudence as well as the impact this Court's ruling will have in the future.

## CITIZENS HAVE A RIGHT TO ENJOY GOODS WITHOUT UNINVITED MONITORING

The Court below and at least one other Court have recognized a citizen's right to enjoyment of chattels without uninvited monitoring. *United States v. Karo*, 710 F.2d 1433, 1438 (10th Cir. 1983); *United States v. Lewis*, 621 F.2d 1382 (5th Cir. 1980). In the instant case, the Circuit Court, echoing the reasoning of *Lewis, supra*, wrote:

> All individuals have a legitimate expectation of privacy that objects coming into their rightful ownership do not have electronic devices attached to them, devices that would give law enforcement agents the opportunity to monitor the location of the objects at all times and in every place that the objects are taken. . . ." *United States v. Karo*, 710 F.2d 1433, 1438 (10th Cir. 1983).

Similarly, in a dissenting opinion in *United States v. Michael*, members of the Fifth Circuit Court of Appeals noted that:

> "The owner of a proprietary or possessory interest in private property is constitutionally entitled to expect that executive agents of government will not trespass upon his property without authorization and will not, by continuing to trespass, use his property to maintain electronic surveillance upon his movements." *United States v. Michael, supra*, at p. 265 (dissenting opinion).

Thus, ridiculously stated, and for dramatic effect, the question presented is whether or not the Fourth Amendment permits the DEA's most extraordinary Special Agent, who not only can neither see, hear or speak, but who

is also light of foot and completely inconspicuous to enter one's home without prior judicial authorization transmitting nothing more to his fellow agents than that he is "there", say by flashing venetion blinds or perhaps beeping if he is. Certainly, this Court would not permit such surveillance without prior judicial authorization, however limited or narrow the information conveyed. Thus, the degree of intrusiveness cannot be the criterion for determining whether or not Fourth Amendment protections are implicated. It must be that the Fourth Amendment protects "zones of privacy", any area in which a citizen entertains a reasonable expectation of privacy from governmental intrusions, however subtle and inoffensive. Insofar as beepers are concerned the inquiry ought not to focus on the information conveyed, but, rather, *from* what and *about* what area or zone such information is *transmitted*. And in this respect monitoring a beeper secreted in a non-contraband good being stored within what is indisputably a "zone of privacy" is no different than the situation described above concerning the DEA's extraordinary agent.

## TECHNOLOGICAL ADVANCES HEIGHTEN NEED FOR FOURTH AMENDMENT PROTECTIONS

Furthermore, as the facts of this case illustrate, this decade has marked the beginning of extraordinary technological advances which will undoubtedly change the course of investigative practices and policies and to which the Fourth Amendment protections must be applied. Here, the government utilized not only a beeper but also a closed circuit video camera and an entry tone alarm. Such resort to the latest electronic wizardry is what prompted a panel of the Fifth Circuit Court of Appeals

to state, in its now vacated opinion in *United States v. Butts, supra*:

> "The high technology, electronic age in which we live highlights and exacerbates the historical tension between liberty and order. In this opinion we have attempted to bestow upon the right to privacy the dignity and primacy that it deserves, while cautioning governmental authorities that obedience to the law is essential lest respect for the law diminish to a point of nonexistence. To permit the government to invade the constitutional rights of its citizens is too high a price to pay for law enforcement. Certainly law enforcement officers must have powers and authorities, but we must be parsimonious and niggardly in opening up the private elements of our lives in the name of catching a marijuana salesman or two. We must be careful not to mutilate the Fourth Amendment bit by bit and piece by piece, until it is relegated to a position of near obscurity." *United States v. Butts, supra,* at pp. 1152-53.

Clearly, law enforcement has responded to the technological onslaught by efficiently utilizing and implementing surveillance devices unimaginable twenty years ago. The Government today can much more efficiently and surreptitiously invade that which individuals both legitimately and illegitimately seek to preserve as private. It can, completely without detection, electronically, very neatly and discretely "appear" in any man's home, automobile or can of "Prince Albert" conveying to human personnel perhaps whole conversations or mere singular, but private facts, such as physical presence.

Certainly, the Constitution's framers could not have envisioned such fantastic possibilities. But if they could have, can one even wonder that they would have been

even more convinced of its necessity, perhaps, denoting it the First Amendment? As the Government more and more rapidly approaches Orwell's horrible Big Brother in surveillance potential, however noble their current motivations, this Court must insist that the detached judiciary and not necessarily biased and ulteriorly motivated law enforcement officers decide when and for how long incredible and marvelous devices such as beepers secreted in seemingly innocuous containers which may ultimately be transported from one home to another may be resorted to.

## CONCLUSION

The use of tracking devices has generated a great deal of litigation and commentary,[13] since traditional Fourth Amendment values and protections are pitted against the rapidly moving electronic age. The honing device in this case was surreptitiously implanted in the private (non-contraband) property of the respondents in order to enhance the agents' ability to shadow the property and its possessors.

The central inquiry in this case is the same as that raised in *United States v. Knotts, supra, Smith v. Maryland,* 442 U.S. 735 (1979), *Dalia v. United States,* 441

13. *See Note,* Tracking Katz; Beepers, Privacy, and the Fourth Amendment, 86 Yale L.J. 1461 (1977); *Carr,* Electronic Beepers, 4 Search & Seizure L. Rep. No. 4 (1977); Dowling, "Bumper Beepers" and the Fourth Amendment, 13 Crim. L. Bull. 266 (1977); Marks & Batey, Electronic Tracking Devices: Fourth Amendment Problems and Solutions, 67 Ky. L. J. 987 (1978); Note, Electronic Tracing Devices & Privacy: See No Evil, Hear No Evil, But Beware of Trojan Horses, 9 Loy. U. Chi. L. J. 227 (1977); Note, Finders Keepers, Beepers Weepers: *United States v. Knotts*—A Realistic Approach to Beeper Use and the Fourth Amendment, 27 St. Louis U. L. J. 483 (1983); Annot., 57 A.L.R. Fed. 646 (1980).

U.S. 238 (1979) and *Katz v. United States*, 389 U.S. 347 (1967): whether the government intruded into an area where privacy can most legitimately be expected. Clearly, the uninvited and warrantless intrusion into four separate homes and two private lockers over a period of five months constitutes a series of continuing searches. The Government must be rebuffed in its attempt to legitimize the warrantless penetration of the last bastion of unfetterred privacy: a person's dwelling.

MARCH, 1984.

Respectfully submitted,

GOLDSTEIN, GOLDSTEIN & HILLEY
2900 Tower Life Building
San Antonio, Texas 78205

By: _____
GERALD H. GOLDSTEIN

By: _____
ROBERT B. HIRSCHHORN

By: _____
RALPH A. LOPEZ

*Attorneys for Amicus Curiae, National Association of Criminal Defense Lawyers*

No. 83-850-CFY
Status: GRANTED

Title: United States, Petitioner
v.
James Connors Karo, et al.

Docketed:
November 22, 1983

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Zvolanek,Alan F., Hollander,Nancy, Roberts,Charles Louis, Beam,James R., Boult,Reber, Bargas,Roger

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Oct 14 1983 | | Application for extension of time to file petition and order granting same until November 24, 1983 (White, October 17, 1983). |
| 2 | Nov 22 1983 | G | Petition for writ of certiorari filed. |
| 3 | Dec 21 1983 | | DISTRIBUTED. January 13, 1984 |
| 4 | Dec 29 1983 | X | Brief of respondents William Robertson Harley, et al. in opposition filed. |
| 5 | Dec 29 1983 | X | Brief of respondents James C. Karo, et al. in opposition filed. |
| 6 | Jan 16 1984 | | Petition GRANTED. |
| | | | ********** |
| 7 | Jan 23 1984 | | Record filed. |
| 8 | Jan 23 1984 | | Certified original record & C.A. proceedings received. |
| 9 | Feb 21 1984 | G | Motion of respondent Gene R. Rhoces in this Court for appointment of counsel filed. |
| 10 | Feb 21 1984 | | DISTRIBUTED. February 24, 1984. (Above motion) |
| 14 | Feb 27 1984 | | The motion for appointment of counsel is granted and it is ordered that respondent Gene R. Rhodes is allowed |
| 15 | Feb 27 1984 | | to proceed in forma pauperis and that Roger Bargas, Esquire, of Albuquerque, New Mexico, is appointed to |
| 16 | Feb 27 1984 | | serve as counsel for the respondent Gene R. Rhodes in this Court. Justice Blackmun dissents. |
| 17 | Mar 6 1984 | | Brief of petitioner United States filed. |
| 18 | Mar 9 1984 | | Joint appendix filed. |
| 19 | Mar 20 1984 | | SET FOR ARGUMENT. Wednesday, April 25, 1984. (2nd case) |
| 20 | Apr 2 1984 | | Brief of respondents Karo, Roth and Steele filed. |
| 21 | Apr 2 1984 | | CIRCULATED. |
| 22 | Apr 3 1984 | X | Brief of respondents Harley and Horton filed. |
| 23 | Apr 2 1984 | X | Brief amicus curiae of Natl. Assn. of Criminal Defense Lawyers filed. |
| 24 | Apr 9 1984 | X | Brief of respondent Gene R. Rhodes filed. |
| 25 | Apr 13 1984 | X | Reply brief of petitioner United States filed. |